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Nos. 06-969 & 06-970

In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SEN. JOHN MCCAIN ET AL., *Intervenor-Appellants*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

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QUESTIONS PRESENTED

1. Whether this case is within the exception to mootness for matters capable of repetition yet evading review.

2. Whether the electioneering communication prohibition at 2 U.S.C. § 441b is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. ("WRTL") here and/or

(b) genuine grassroots lobbying communications,

with any communications to be funded from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

3. Whether this Court's facial upholding of the electioneering communication prohibition in *McConnell v. FEC*, 540 U.S. 93 (2003), must be overturned because (a) Appellants insist that WRTL's ads are in the "heartland" or "core" of what Congress intended to restrict with the electioneering communication prohibition and (b) in practice the remedy of as-applied challenges to protect genuine issue ads has proven inadequate.

CORPORATE DISCLOSURE STATEMENT

Wisconsin Right to Life, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock. Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

STATEMENT 1

1. Roots of This Case 1

2. Present Appeals 8

SUMMARY OF THE ARGUMENT 24

ARGUMENT 25

I. This Case Is Within the Mootness Exception. 25

II. Strict Scrutiny Applies. 29

A. *Self-Government Right.* 30

B. *Expression Right.* 30

C. *Expressive Association Right.* 30

D. *Petition Right.* 31

E. *PAC Mandates Trigger Strict Scrutiny.* 33

F. *McConnell Employed Strict Scrutiny.* 35

G. *McConnell Did Not Create an Intent-and-Effect Test.* 36

H. *McConnell Did Not Shift the Burden of Proof.* 39

I. *The Avoidance-Option Is Inadequate.* 43

1. Not Broadcasting Is Inadequate. 44

2. Non-Incorporation Burdens the Association Right. 44

3. Other Times Are Inadequate. 45

4. Not Naming a Candidate Is Inadequate. 45

5. Not Targeting Is Inadequate. 46

III. The Prohibition Fails Strict Scrutiny as Applied. 46

A. *Asserted Interest.* 46

B. *Narrow Tailoring.* 47

C. *Less Restrictive Means.* 48

D. *McConnell's Other Concerns Not Implicated.* 49

IV. Genuine Issue Ads Can Be Adequately Identified and Exempted from the Prohibition. 50

A. *The Unfulfilled Promise.* 50

B. *The Concession.* 53

C. *Cognizable Effect.* 54

D. *The Prototype.* 55

E. *WRTL's Ads Meet the PBA Ad Test.* 57

F. *The FEC's Erroneous Subjective Intent Test.* 59

V. *McConnell*'s Facial Upholding Should Be Overturned. 62

A. *Appellants Put McConnell at Issue.* 62

B. *The As-Applied Remedy Is Inadequate.* 65

C. *Absent Clear Protection for Grassroots Lobbying, McConnell's Facial Upholding Should Be Overturned.* 68

CONCLUSION 69

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919) 2

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 68

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 35, 47

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 27

BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002) ... 31, 61

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 61

Boy Scouts of America v. Dale, 530 U.S. 640 (2001). 31

Bridges v. California, 314 U.S. 252 (1941) 4

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 41, 63, 65

Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87 (1982) 43

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Cal. Med. Assoc'n v. FEC, 453 U.S. 182 (1981) 18, 59

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 32, 61

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 67

Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995) 28

Christian Civic League of Maine, Inc. v. FEC (No. 06-589) ..... *passim*

Christian Civic League of Maine, Inc. v. FEC, 433 F. Supp. 2d 81 (D.D.C. 2006) 58, 66

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 62, 64

Dombroski v. Pfister, 380 U.S. 479 (1965) 66

Eastern R.R. President Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 31-32, 48, 61

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 6, 33, 34, 43, 47, 49, 58, 61

FEC v. National Conservative PAC, 470 U.S. 480 (1985) 33

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5, 18, 27-30, 32, 47, 49

Healy v. James, 408 U.S. 169 (1972) 60

Helvering v. Hallock, 309 U.S. 106 (1940) 69

Lawrence v. Texas. 539 U.S. 558 (2003) 69-70

Liberty Lobby, Inc. v. Pearson, 390 F. 2d 489 (D.C. Cir. 1968) 31

Los Angeles v. Lyons, 461 U.S. 95 (1983) 28

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) 7, 9, 22, 39, 41, 44- 46, 49, 56, 57

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 64

Meyer v. Grant, 486 U.S. 414 (1988) 45

Mine Workers v. Pennington, 381 U.S. 657 (1965) 61

Murphy v. Hunt, 455 U.S. 478 (1982) 27

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 43

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 67

New York Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 65

New York Times v. Sullivan, 376 U.S. 254 (1964) ... 2-5, 32

New York v. Ferber, 458 U.S. 747 (1982) 65

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 31

Payne v. Tennessee, 501 U.S. 808 (1991) 69

Randall v. Sorrell, 126 S. Ct. 2479 (2006) 69

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 33, 47

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 68

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ... 31

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 68, 69

Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969) 68

Smith v. Allwright, 321 U.S. 649 (1944) 69

Speiser v. Randall, 357 U.S. 513 (1958) 60

Storer v. Brown, 415 U.S. 724 (1974) 26

Thomas v. Collins, 323 U.S. 516 (1945) 6

Vance v. Universal Amusement Co., 445 U.S. 308 (1980) . 67

Vasquez v. Hillery, 474 U.S. 254 (1986) 69

Virginia v. *Hicks*, 539 U.S. 113 (2003) 63, 66

Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 126 S. Ct. 1016 (2006) 7, 10, 36, 40, 41, 53

Constitution, Statutes, Regulations & Rules

1 Stat. at Large 596 2

2 U.S.C. § 431(8) 9

2 U.S.C. § 434(f) 39

2 U.S.C. § 434(f)(2)(E) 48

2 U.S.C. § 434(f)(3) 61

2 U.S.C. § 434(f)(3)(B)(iv) 52

2 U.S.C. § 441b ..... i, 5, 43, 60

26 U.S.C. § 501(c)(3) 35

26 U.S.C. § 501(c)(4) 51

26 U.S.C. § 527 ..... 34, 51

11 C.F.R. § 100.29 61

11 C.F.R. § 114.1(e)(1) 34

11 C.F.R. § 114.1(e)(2) 34

11 C.F.R. § 114.6 35

11 C.F.R. § 114.7(a) 34

26 C.F.R. § 1.501(c)(3)-1(a)(i) 34

67 Fed. Reg. 51131 52

Alaska Stat. § 15.13.400(5) 69

Ariz. Civ. Stat. Ann. § 16-901.01 69

BCRA § 203 5

BCRA § 403(a)(4) 27

Bipartisan Campaign Reform Act of 2002 ..... *passim*

Cal. Gov. Code § 85310 69

Colo. Const. Art. XXVIII, § 2(7) 69

Conn. Gen. Stat. § 9-333c 69

Electioneering Communications, 67 Fed. Reg. 65190 (Oct. 23, 2002) 52

Federal Election Campaign Act of 1971 1

Fl. Stat. § 106.011(18) 69

Guam Code Ann. tit.3, § 19112.1 69

Hi. Code R. § 11-207.6 69

Idaho Code Ann. § 67-6602(f)10 69

Ill. Comp. Stat. 5/9-1.14 69

N.C, Gen. Stat. § 163-278.80(2) 69

Okla. Stat. tit. 74, § 257:1-1-2 69

S.C. Code Ann. § 8-13-1300(31)(c) 69

Taft-Hartley Act of 1947 1

Tillman Act of 1907 ..... 1, 6

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. X. 30

U.S. Const. amend XIV 30

U.S. Const. amend. XVII. 30

U.S. Const. art. I, § 1 30

U.S. Const. art. I , § 1 30

U.S. Const. art. IV, § 4 30

Vt. Stat. Ann., Titl 17 § 2891 69

Wash. Rev. Code § 42.17.020(20) 69

W. Va. Code § 3-8-1A(10) 69

Other Authorities

147 Cong. Rec. S2458 51

147 Cong. Rec. S2813 51

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FEC Advisory Opinion 2004-31 53

Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773 (2001) 48

Helen Devar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004 8

IRS Rev. Rul 2004-6 34

John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.

J. 409 (1983) 68

Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1 ..... 8, 15

Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004 15

Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, Roll Call, May 23, 2005 16

John Milton, *Aeropagitica* (John W. Hales, ed., 3d. ed. 1882) 1

John E. Nowak, Ronald R. Rotunda & J. Nelson Young, *Constitutional Law* (3d ed. 1986) 1, 2

'Nuclear' Truce, Roll Call, Nov. 17, 2004 16

Bradley A. Smith & Jason Robert Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis*, 20 Stan. L. & Pol'y Rev. 101 (2007) ... 30-31

STATEMENT

1. ***Roots of This Case.*** The deep roots of this case lie not in the Bipartisan Campaign Reform Act of 2002, the Federal Election Campaign Act of 1971, the Taft-Hartley Act of 1947, the Tillman Act of 1907, nor even the First Amendment, but in the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions.[1]

"[I]n the three centuries prior to the Declaration of Independence, the King required the suppression of ideas antagonistic to the Crown" by sedition laws, control of the press, and constructive treason. Nowak, Rotunda & Young, *Constitutional Law* at 830. The Star Chamber developed the doctrine that the King originated justice and was above criticism, without regard to truth (truth merely enhanced the libel). *Id.* at 831 (citations omitted). There was also the prior restraint of government licensing before publication could be lawful. *Id.*[2]

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[1]In the Middle Ages, religious authority established political authority, and religious and governmental authorities who believed that they ruled infallibly by divine right sought to suppress popular opinion. John E. Nowak, Ronald R. Rotunda & J. Nelson Young, *Constitutional Law* at 830 (3d ed. 1986) [hereinafter Nowak, Rotunda & Young, *Constitutional Law*]. "Dissent from this authority meant not only to be wrong, but to be damned." *Id.* As governments became less accountable to religious authorities, government officials yet felt it "essential . . . that the popular opinion of the government be preserved" to facilitate taxation and conscription. *Id.* (citation omitted).

[2]A leading light in the reform effort that ultimately led to the First Amendment was John Milton, who battled English censors and wrote this eloquent defense of liberty in 1644: "[T]hough all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting, to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?" John Milton, *Aeropagitica* 51-52 (John W. Hales, ed., 3d. ed. 1882).

These oppressive practices were carried into the American colonies, as was the original reform movement, which was the effort to restrict the government's ability to prevent the people from discussing public issues and public officials' conduct of their office. *Id.* at 832.[3] The Framers of the American Constitution protected the people by limiting government powers, and in 1791 the people ratified the First Amendment, mandating that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This great reform victory was aimed directly at halting incumbent politicians' efforts to silence criticism about their actions.[4] America had adopted the marketplace of ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Despite the First Amendment, politicians persisted in efforts to silence criticism with enactment of the Sedition Act of 1798.[5] The Sedition Act "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times v.*

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[3]By 1765, when Blackstone first published his *Commentaries*, the battle against prior restraints had been largely won, but publishers were yet subject to seditious libel laws. Nowak, Rotunda & Young, *Constitutional Law* at 832-33 (*citing Commentaries on the Laws of England*, Book IV pp. *151-52 (T. Cooley, ed.: 2d ed., rev. ed. 1872)).

[4]These visionaries saw that "a central value of the free press, speech, and assembly lies in 'checking' the abuse of power by government officials" and it is necessary to avoid the "slippery slope" of giving government power to restrict speech "when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas." Nowak, Rotunda & Young, *Constitutional Law* at 836.

[5]The Act barred "publishing any false, scandalous and malicious writing . . . against the government . . . , or . . . Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute . . . ." 1 Stat. at Large 596 (truth was a defense).

Sullivan, 376 U.S. 254, 273 (1964). The Act was attacked as unconstitutional by Jefferson, Madison, and the Virginia General Assembly, the latter condemning it for restricting "'the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'" *Id.* at 274 (citation omitted). Madison wrote the protest Report,[6] founding his argument on the fact that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty,'" *id.* at 274 (citation omitted), and in the House of Representatives Madison also observed: "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* at 275. "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.* at 275. As a result, "the court of history" had reached a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.* at

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[6]The Report noted the lack of accountability that would result if officials were free of ongoing public scrutiny and discussion of their actions:

> It is manifestly impossible to punish the *intent* to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

New York Times, 376 U.S. at 275 n.15 (quotation marks and citation omitted) (emphasis added).

276. The Act expired in 1801, and those convicted under it were pardoned and their fines remitted by President Jefferson. *Id.* & n.16.

Bridges v. California, 314 U.S. 252 (1941), dealt with another effort to silence criticism, this time of judges, where individuals, who had published stories about pending cases were fined for contempt of court. *Id.* at 258. This Court rejected reliance on English common law allowing such speech suppression because "'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" *Id.* at 264 (citation omitted). The Court noted the asserted "substantive evil" of "disrespect for the judiciary," *id.* at 270, which included "*criticism* of the decision of the court," *id.* at 270 n.15 (emphasis added), and rejected the "assumption that respect for the judiciary can be won by shielding judges from published *criticism*." *Id.* at 270 (emphasis added). The Court said "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *id.* (footnote omitted), and concluded that "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than . . . enhance respect. *Id.* at 270-71.

In 1964, *New York Times v. Sullivan*, 376 U.S. 254, dealt with another effort by politicians to silence criticism. Despite the libel immunity that public officials enjoy for their public debate (in order to encourage robust debate), Alabama's libel law provided no similar immunity to the people's discussion of public officials' actions. A group supporting Dr. Martin Luther King, Jr. took out a *New York Times* ad criticizing the actions of police in Montgomery, Alabama against civil-rights demonstrators. The city commissioner in charge of police claimed that the ad libeled him by implication. *Id.* at 288. This Court established the "actual malice" standard for discussing public officials, reaffirming "a profound national commitment to the

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

This struggle of the government to silence the people continues here as BCRA sponsors, Intervenors herein, defend the "electioneering communication" prohibition[7] by declaring that quashing criticism is the true intent behind the provision and thus argue that broadcast ads are sham, not genuine, if the ads (a) "took a *critical* stance regarding a candidate's position on an issue" and (b) "referred to the candidate by name." Intervenors' Br. at 22 (emphasis added). Intervenors' Brief is replete with complaints about Senators being criticized for their positions on a current legislative matter. *See id.* at 3, 10, 11, 15, 16, 22, 23 n.11, 24, 25 n.14, 27, 28, 36. So is the FEC's Brief. *See* FEC Br. at 10, 11, 19, 20, 33, 44, 48.

The roots of this case also lie in the right of the people to engage in self-government by employing their First Amendment liberties to amplify their voices through associating, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976) and in the unquestioned right of corporations to freely advocate issues. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978). So with respect to "*genuine issue ads*," *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003) (emphasis added), there is no corporate-form interest to justify a *prohibition*. Historically, the Constitution and this Court have protected corporate expression about public policy generally and about the adoption of laws specifically. Thus, pro-

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[7]"Prohibition" herein refers to 2 U.S.C. §§ 441b(a)-(b)(2) (2004) ("It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election . . . . '[C]ontribution or expenditure' includes . . . any applicable electioneering communication."). "Prohibition" is an appropriate term because it was used by Congress, BCRA § 203 (entitled "Prohibition of Corporate and Labor Disbursements for Electioneering Communications"), and this Court. *McConnell*, 540 U.S. at 203 (same). Despite the possibility of a PAC-option, a corporation is still *prohibited* from using its own general funds.

hibiting corporations from effective grassroots lobbying has no hoary heritage. Rather, banning corporate grassroots lobbying in "genuine issue ads" is a recent innovation that was spawned in 1947, halted by this Court in 1976, respawned in 2002, and identified by this Court as likely unconstitutional in 2003.[8]

Roots of this case also lie in the passage of BCRA,[9] wherein sponsors of the provision that became the present prohibition promised to protect "genuine issue ads" and particularly grassroots lobbying. *See infra* at Part IV.A. And on the floor, sponsors promoted a provision to authorize the FEC to make

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[8]The Tillman Act only restricted corporate "*contributions* in connection with any election to public office," 34 Stat. 864-65 (emphasis added), so it has nothing to do with the present case, which is about WRTL's own expression. Not until *1947* did Congress try to limit corporate *expenditures* in the Taft-Hartley Act, which limitation was only in full effect until this Court had an opportunity to address it in *Buckley*. 424 U.S. 1. Then this Court noted (a) the vagueness of regulating "any expenditure . . . relative to a clearly identified candidate," *id.* at 42, (b) the fact that "incumbents[] are intimately tied to public issues involving legislative proposals and governmental actions," *id.* at 43, and (c) the rejection of any "'intent and . . . effect'" test in *Thomas v. Collins*, 323 U.S. 516, 535 (1945), and imposed the express advocacy construction to protect a speaker from being "'at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" *Buckley*, 424 U.S. at 42 (*quoting Thomas*, 323 U.S. at 535). The prohibition on corporate independent expenditures was also restricted to express advocacy in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). Under the express advocacy test, WRTL is completely free to run its grassroots lobbying ads. Only in 2002, did Congress again seek to limit such legislative advocacy with its electioneering communication prohibition in BCRA, and even then there was a recognition of the constitutional need to protect the people's right to petition through grassroots lobbying, *see infra* at Part IV.A and this Court in *McConnell* "assume[d]" that as to "genuine issue ads" the prohibition might not survive challenge. 540 U.S. at 206 n.88.

[9]BCRA was supposed to restore the people's trust in government, but instead it declined. *See* The American National Election Studies, "Trust in Government Index 1958-2004" (2002 score of 43 down to 37 in 2004), available at http://www.electionstudies.org/nesguide/toptable/tab5a_5.htm.

exemptions in order to protect "genuine issue ads," *id.*, which led to a 2002 FEC rulemaking on the prohibition, in which the FEC solicited comments on proposed language for a rule exempting grassroots lobbying and then refused to make a rule. *See infra* at Part IV.A-B.[10]

Roots lie in the *McConnell* litigation where *genuine issue ad* was a term of art and specific ads were identified as "genuine issue ads" or sham ads. For example, all three district court judges noted that a grassroots lobbying ad—called herein the "PBA Ad"—was recognized by key defense expert Prof. Goldstein as a "genuine issue ad."[11] As set out below, *infra* at Part IV, this PBA Ad is remarkably like WRTL's ads, proving that they are also "genuine issue ads." Judge Leon also listed "representative examples" of both "genuine issue advertise-

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[10]BCRA prime sponsors and campaign finance reform lobby groups joined in proposing rules to distinguish genuine issue ads from sham ads by focusing on the content of the ads without any investigation into intent-and-effect context. *See infra* at Part IV.B Yet the FEC rejected their rules, along with their rationale, and refused to make a rule. *See infra* at Part IV.A. In 2006, the FEC was twice more asked to make a rule and twice refused, *id.*—even after the Solicitor General was asked at oral argument why the FEC had not made a rule to protect grassroots lobbying, Transcript of Oral Arg. at 43-44 *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 126 S. Ct. 1016 (2006) ("*WRTL I*") (No. 04-1581), and the unanimous opinion of the Court took note of its ability to do so. 546 U.S. 410, 126 S. Ct at 1017.

[11]*McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.), 905 (Leon, J.), 748 (Kollar-Kotelly, J.). This "genuine issue ad" was originally called the "Feingold Kohl Abortion 60 Ad" but for ease of memory is called the "PBA Ad" because its topic is partial-birth abortion ("PBA"). Furthermore, the Brennan Center's *Buying Time* reports, which played a central role in *McConnell* and were based on Goldstein's work, acknowledged that the prohibition swept in "genuine issue ads." The key question by which Goldstein's student coders distinguished genuine from sham issue ads was Question 6: "'In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is to generate support or opposition for a particular **candidate**.'" *McConnell*, 251 F. Supp. 2d at 308-09 (Henderson, J.) (citation omitted) (emphasis in original question).

ments" and "candidate-centered issue advertisements."[12] So when this Court in *McConnell* "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U.S. at 206 n.88, these genuine issue ads were before the Court. The whole *McConnell* facial analysis of the prohibition was to determine whether it swept in too many of these "genuine issue ads." *Id.* at 203-07.

2. *Present Appeals.* The present appeals arise from a constitutional challenge to the electioneering communication prohibition as applied to WRTL's grassroots lobbying ads. In July 2004, Senate filibustering of President Bush's judicial nominees had reached unprecedented, double-digit levels and was coming to a head. Helen Dewar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05; Record 30:3 (*AVC* ¶ 10).[13] WRTL launched a grassroots lobbying campaign to encourage its Senators to oppose the filibuster. Record 30:3-4, 7-8 (*AVC* ¶¶ 12-13, 25-33).[14] From August 15 to November 2, 2004 (80 days, including

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[12] *Id.* at 914-18. For analytical convenience, a number of ads (including all *five* of WRTL's grassroots lobbying ads in the record and the ad at issue in *Christian Civic League of Maine, Inc. v. FEC* (No. 06-589 in this Court) ("*CCLM*")) have been collected in the Appendix to James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) [hereinafter Bopp & Coleson, *Distinguishing*] (print version forthcoming 2007) (Article currently accessible online at www.law.campbell.edu/lawreview, by following the "Issue – Full text" link, then following the "Volume 29, Number 3 – Spring 2007" link.). The Appendix also assists analysis by collecting several proposed tests—including by Intervenors and their counsel—to distinguish genuine issue ads from sham ads.

[13] On July 21, the Senate failed to invoke cloture on the ongoing filibuster of the nomination of William Gerry Myers III as a judge on the U.S. Court of Appeal for the Ninth Circuit. Record 30:3 (*Amended Verified Complaint* ¶ 8 ("*AVC*")); 150 Cong. Rec. S8459-60. A fall showdown was predicted. Record 30:3 (*AVC* ¶¶ 8-11); Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

[14] On July 26, 2004, WRTL began broadcasting a radio advertisement

November 2), WRTL's ads would have been prohibited electioneering communications.[15]

Broadcast advertisements are the most effective form of communication for a grassroots lobbying campaign.[16] While WRTL did not believe that it was constitutionally required to use PAC funds for what it regards as constitutionally protected "genuine issue ads," using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option.[17]

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entitled "Wedding," Record 30:3 (*AVC* ¶ 12), JS App.3a, and also broadcast two other ads before all broadcasting was halted by the prohibition. (The text of "Wedding" and the other two ads broadcast, "Loan" and "Waiting" are at JS App. 3a n.3, 4a n.4, and 5a n.5, respectively). WRTL intended to continue broadcasting its grassroots lobbying ads, and materially similar ads, throughout August 2004 and until the matter was voted on in the fall. Record 30:3-4, 7 (*AVC* ¶¶ 12-13, 28-29); JS App. 6a.

[15]Record 30:2, 4, 6 (*AVC* ¶ 6, 13-14, 23-34); JS App. 6a-7a. From August 15 to September 3 (30 days before the primary election), the prohibition existed solely because of Wisconsin's September primary, during which Sen. Feingold ran *unopposed*, as noted by Appellants' amici curiae Briffault and Hassen. *See* Briffault & Hasen A.C. Br. at 25 n.9. These amici suggest that an exemption might be appropriate where a candidate is running unopposed, and note that, in the *CCLM* case (No. 06-589), Sen. Snowe was running unopposed in her primary. *Id.* Judge Kollar-Kotelly apparently agreed, claiming that the "uncontroverted record" in *McConnell* showed that genuine issue ads could be distinguished from "candidate-centered issue advocacy" on three criteria, the third being "if the advertisement is run in a competitive race." *McConnell*, 251 F. Supp. 2d at 567.

[16]Non-broadcast communications would not have provided WRTL with sufficient ability to reach people with WRTL's message. Record 30:10 (*AVC* ¶ 51). In *McConnell*, Judge Kollar-Kotelly expressly found that other means of communication were less effective (and some were more expensive) than broadcasting. 251 F. Supp. 2d at 569-73 (*citing* various experts).

[17]As of August 6, 2004, WRTL-PAC had $13,766.90 in its account. And these were the only funds that WRTL could use for federal candidate contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If these funds were used for the grassroots lobbying ads, they would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make, Record 76, Attachment 1

So on July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its ads past the August 15th beginning of the prohibition period. WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA.[18]

The preliminary injunction was denied on August 12, 2004, and WRTL ceased broadcasting because its ads were prohibited. The district court dismissed the case on the basis that the language and logic of *McConnell* precluded as-applied challenges and added that "'WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating,'" *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1018 (citation omitted).

In *WRTL I*, the FEC argued that *McConnell*'s approval of the "bright-line" "electioneering communication" precluded as-applied exemptions and that WRTL's ads were not genuine issue ads. *Id.* Despite these arguments, this Court unanimously remanded the case for consideration of the merits of the as-applied challenge.[19]

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at 3-4 (Lyons Affid. ¶¶ 1-7), and were not sufficient for the planned grassroots lobbying advertising expenditures of $100,000. *Id.* at 6 (Lyons Affid. ¶ 14). PAC money is also difficult to raise, being subject to source, amount, and disclosure requirements, and WRTL believed it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. *Id.* at 4-5 (Lyons Affid. ¶¶ 8-10).

[18]Full disclosure of WRTL's identity and activities as required by law would have been forthcoming. Record 30:8-9 (*AVC* ¶¶ 35-37). WRTL's ads contained the disclaimers required by 11 C.F.R. § 110.11. Record 30:9 (*AVC* ¶ 36); *see* JS App. 3a-5a (transcripts). WRTL's electioneering communication activity would have triggered a "disclosure date" of August 15, requiring it to file a report of electioneering communication activity by 11:59 p.m. on August 16. Record 30:8 (*AVC* ¶ 34).

[19]On remand, WRTL argued that the district court should reinstate and decide cross-motions for summary judgment that had been completed before the district court dismissed the case, but the court permitted extensive discovery and ordered new summary judgment briefing. WRTL argued that

Since this Court has rejected any intent-and-effect test, *Buckley*, 424 U.S. at 42, Appellants' reliance on a voluminous record purporting to attempt to prove WRTL's intent in running the ads and the ad's speculative effect on the 2004 election is misplaced. WRTL vigorously disputed many of Appellants' factual allegations below. For example, the FEC cites a swatch of its *proposed* findings of fact allegedly supporting the assertion that WRTL had "intended from the outset to air the advertisements during the BCRA pre-election period, even though the agency was generally capable of creating a radio advertisement in a week and television advertisements in two weeks." FEC Br. at 11, n.3; *see also id.* at 11, 13 (citing and quoting, respectively, Judge Roberts's dissent in the lower court criticizing the timing of the ads and the lack of ads after the 2004 election (which cites, in turn, Appellant's limited excerpts of deposition testimony)).

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any proper rule would focus on the communication's text and the relevant context (*see infra* at n.30), but the court permitted discovery on the intent-and-effect context that the FEC and Intervenors said was necessary to their theory of the case. As a result, even in this (statutorily-mandated) "expedited" case, WRTL was subjected to depositions of its executive director and its legislative and PAC director. Even the lead communications consultant at its outside advertising agency was deposed, as was a woman who did fundraising for WRTL. WRTL was required to produce a substantial volume of documents about its inner workings, plans, and finances—all information that an ideological group would otherwise keep private. Since the FEC retained two experts, WRTL attorneys needed to depose them. Since Sen. McCain et al. were permitted to intervene, WRTL has been required to respond to double briefing and extra discovery requests. The docket below shows that the FEC had 10 attorneys working on the case and the Intervenors have enjoyed the full support of the campaign finance reform lobby and counsel associated with them. *See, e.g.*, Intervenors' Br. (listing 19 attorneys). In sum, there has been a substantial investment of time and money by WRTL in this case that could have been put to advancing ideological causes by speech and petition had it not been required to vindicate constitutional rights to do so. No attorneys fees are awarded in lawsuits against the FEC, as would be the case when states violate constitutional rights.

The district court ultimately found Appellants' approach—an investigation attempting to establish the intent of the would-be speaker and the likely effect of its communication on the election—to be practically and theoretically inappropriate and so made no findings as to an external intent-and-effect context.. Even the dissent thought that key facts were not established and would require a trial to resolve. *See* JS App. at 30a, 45a, 46a, 47a-48a (references herein are to the *FEC*'s JS App.). And because WRTL objected to many alleged facts, *see* Record 88, Attachment 2; Record 89, Attachment 1, and proposed countering findings of fact, *see* Record 103, Appellants may not portray their version of the alleged intent and effect of the ads as established. In fact, WRTL did *not* intend to affect the election,[20] and defense expert Bailey expressly stated at his deposition that WRTL's Waiting Ad might not have *any* effect on the election. JA 148.

A prime example of the two views of the facts is the timing of WRTL's ads. Since this is a centerpiece of Appellants "intent" argument it will be addressed. The record evidence

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[20]Ample evidence shows that WRTL's ads were not intended to affect the 2004 election. For example, Defendants' expert Franklin agreed that the ads' target demographic, "public policy aware adults, ages 45+ with male skew," Record 81-2:44 (Franklin Exp. Rep. at 36), meant the ads were effective with people "less likely [to] change [their] mind" or "convert," but "more likely to make the call [to a senator about the issue]." JA 196-97. *See also* Record 81-2:78, 79 (Lyons Dep. at 26:6-17,31:17, 33:5-11) (WRTL did not discuss any other purpose for or any impact on elections from the ads and had no reason to think that the ads would affect the election); Record 81-2:163-64, 166, 168, 185-86) (Vanderground Dep. at 45:25-46:2, 54:11-14, 63:14-64:2, 133:11-134:8) (ad consultant never told purpose of campaign was to affect election, never researched or considered affecting election, and never discussed with anyone or remembered "even an offhand comment anywhere" that purpose was, or "likely impact" would be, to affect election and did not believe ads impacted race); Record 81-2:196-97, 199 (Weiss Dep. at 14:10-20, 15, 23:11-25) (fundraiser told purpose was "to deal with the issue of filibustering," no candidates were mentioned, and when contacting possible donors she never mentioned any other reason for giving).

shows that WRTL ran the ads when public interest in the filibustering issue, actual and projected filibuster votes, and the ability to create and fund the ads and website coincided.[21] Barbara Lyons had advised media consultant Vanderground that she would like to get the anti-filibuster campaign started as soon as possible. Vanderground looked at how long it would take to develop TV and radio ads, along with the BeFair.com website that he recommended as most effective for contact and background information, and said that July 26, 2004, was the first date possible to launch the campaign—based on making all the preparations. Record 81-2:174.[22] As for whether it is

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[21]The snippet of testimony that the FEC cites as "indicat[ing]" that WRTL intended to air the Ads during the prohibition period so that "the advertising campaign would result in litigation" FEC Br. at 11 n.3, was from Jason Vanderground, the experienced lead consultant employed by Hanon McKendry, the advertising and brand consulting firm hired by WRTL to prepare its grassroots lobbying campaign. When read as a whole, Vanderground was recalling WRTL's Executive Director, Barbara Lyons, explaining how the electioneering communication prohibition might affect the broadcast schedule for the ads: "She felt like that she understood that Campaign Finance Reform [sic] said that there was a certain time when the ads couldn't run . . . ." Record 81-2:162-63 (Vanderground Dep.). WRTL's explanation of the law's effect was accurate and offering it to the person responsible for the planning and broadcast of the ads was unremarkable. To Vanderground's recollection, the point Barbara Lyons made was that WRTL understood that unless an injunction were granted, the ads couldn't run at a certain time because the electioneering communication prohibition would apply, not that WRTL intended to run them when they were prohibited or wanted to plan the ads' broadcast to result in a lawsuit. When counsel for the FEC asked Vanderground if Lyons "or other people from [WRTL]" indicated that she expected the ad campaign to result in a court case, he answered "she told me that she was hopeful that we would be able to continue to running the campaign." *Id.* Contrary to the FEC's characterizations, the record shows that WRTL's focus was on running the ads effectively and that it was hopeful that the broadcasts would not have to be interrupted. Vanderground did not understand Lyons or anyone at WRTL to communicate or give the impression that the ads or their broadcast were to be developed so as to lead to a court challenge to the prohibition. *Id.*

[22]The project could not be launched earlier because it was a large, inte-

important to run grassroots lobbying advertising shortly before legislative votes occur, see FEC Br. at 11; Intervenors' Br. at 27, according to WRTL's experienced consultant, timing the ads to coincide with existing public interest was as important as timing them to run "shortly before" legislative votes.[23] The

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grated campaign and there just wasn't enough time to make preparations earlier, especially during the summer months with vacations. Based on its schedule and the work Hanon McKendry had to do, the campaign could not be launched earlier. Record 81-2:174. In urgent circumstances Hanon McKendry can create and air radio ads in about a week and television ads in about two weeks, *id.* at 158, 174, but WRTL's campaign required significantly more time because of the planned quality of the spots, and the required time for strategy writing, developing creative concepts, refining ideas, planning production, and producing the ads. *Id.* at 174-75. Lyons never indicated to Vanderground that the timing had anything to do with when the prohibition would begin or that potential litigation played any role in the timing, rather he said that the primary reason for the timing was the prominence of the filibuster issue then and WRTL's desires to address it while it was in the media and as soon as possible. *Id.* at 175.

[23]When asked by counsel for FEC whether it was generally preferable to run advertising "like the filibuster advertising" close in time to when the legislative vote is to occur, Mr. Vanderground said "[i]t could be . . .[but] [n]ot necessarily." Record 81-2:167. He explained:

> . . . a lot of times you're timing it more around when the issue has some attention, when it's a natural time to direct people's attention to it, and so it would—if it was an issue that was being addressed in the public sector, it would make sense to have the campaign run then irregardless of whether or not there was a specific vote on a specific day or a specific week. . . . We have an issue, people are talking about that issue, and so it makes sense to address that issue right now, and just because an environmental situation may change and then may change and then may change again, that doesn't necessarily mean that you would completely change what you're doing as a campaign just because one element of that may take a different shape.

Id. at 167-68. When asked why it wasn't important in scheduling the campaign to track when the votes were going to occur, Vanderground answered that he was "thinking much more about—the public opinion arena and . . . looked more at that it was a topic of significant conversation and less

record shows that the level of public interest in judicial filibusters coincided with WRTL's running the ads. From March 2003 to June 2004, when WRTL decided to run the anti-filibuster ads, Senate Democrats had blocked confirmation votes sixteen times, JA 223 (Franklin Expert Rep. at 7), creating strong public interest at that time. And as events unfolded, there was no reason to suppose that public interest had waned, nor, accordingly, to adjust the schedule for the ads. During July and August of 2004, the publicity surrounding judicial filibustering was at a crescendo. The Republican leadership held four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. *Id.* On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, but the motion failed to garner the required three-fifths vote to invoke cloture. 150 Cong. Rec. S8459-60; Record 30 (*AVC* ¶ 8). The Senate Judiciary Chairman publicly predicted that judicial filibusters would mount before fall adjournment. Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1. Record 30 (*AVC* ¶ 9). Thus, there was no reason to adjust the schedule for the ads, and the fact that WRTL did not do so suggests, if anything, only that WRTL took the advice of its advertising agency.[24]

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on the specific dates in the actual Senate schedule." *Id.* at 167. And while Sue Armacost, WRTL's on-staff legislative lobbyist, agreed in her deposition with the unremarkable proposition that grassroots efforts should occur "fairly close in time to when the votes actually would occur" as opposed to after those votes, Record 81-2:145, this does not conflict with the view that the timing of the ads should be steered mainly by public interest, as advised by Vanderground. Such interest did, in fact, drive the timing of the ads.

[24]Contrary to predictions, the anticipated "fall showdown" did not materialize and no more judicial filibuster votes occurred in 2004, FEC Br. at 11, although WRTL had no way of predicting that when it decided to prepare and run its ads. Senate Republican leaders decided in November 2004 not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of

In the spring of 2005, the filibuster issue was different than it had been in 2004. So there was no reason for WRTL to run ads then. The spring-2005 debate was whether the Senate leadership could garner enough Republican votes to change Senate rules to preclude judicial nominee filibusters, not whether judicial filibusters were good or bad per se or whether the Wisconsin Senators should be supporting them. Record 76, Attachment 1 at 12 (2d Lyons Affid. ¶ 9). The central question was whether Senate Majority Leader Frist could get fifty Republican senators to support the rule change because it was certain that no Democrat senators would support it. Since Wisconsin had no Republican senators, there was no senator to lobby in Wisconsin. *Id.* Defense expert Charles H. Franklin, III agreed that what "came to a head" then was the debate over the use of the so-called "nuclear option":

> The Republican leadership had signaled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. . . . [I]n the March to May time frame, it was clear that it was going to be scheduled. . . . [I]t was clear that it was coming to a head . . . .

JA 205-06 (Franklin Dep. 27:10-20).[25] Finally, the record shows

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Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, Roll Call, May 23, 2005. As counsel for WRTL explained in oral argument before this Court in *WRTL I*, "the filibuster issue, as it related to that session of Congress, it was thought that it was going to come to a head in—in October . . . but it did not." Transcript of Oral Arg. at 9, *WRTL I*, 546 U.S. 410 (No. 04-1581). It was fully appropriate to run WRTL's ads while the Senators were in their home state for recess because they were then more readily accessible to the people back home who would want to lobby them in person on the issue.

[25]Running anti-filibuster ads in the spring of 2005 was also inadvisable

that when sufficient public interest was sustained long enough to allow preparation time, and its available resources allowed, WRTL has run anti-filibustering ads.[26]

This extended discussion of the temporal context of WRTL's ads demonstrates that Appellants' assertions of "fact" and repeated mantra of "undisputed facts" must be viewed with extreme caution because (1) much of what they allege as to facts indicating WRTL's intent is in fact disputed and (2) the undisputed, statutorily and constitutionally cognizable facts are quite limited. *See infra* at n.30 (relevant context) and *infra* at Part IV.C, n.68, n.70.(scope of statutory and constitutional

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because as communication consultant Jason Vanderground testified, it was doubtful whether public interest in the judicial filibuster issue had reached a suitable level then to make an ad campaign viable. Record 81-2:189. Even when instructed by counsel for the FEC to assume that at that time, "the country was paying . . . a lot of attention to the issue," *id.*, Vanderground was still unable to agree that it "would . . . have made sense" to "resurrect" WRTL's campaign. *Id.* When FEC counsel suggested that the attention the issue garnered in the spring of 2005 should have matched that of August of 2004, Vanderground did not agree that it had necessarily reached a comparable crescendo: "My . . . recollection of the situation that you're describing was that it became an issue, very quickly it heated up, and then there was an agreement, and then it really—it became an issue with much less focus, and that the whole scenario happened relatively quickly." *Id.* at 189. It was Vanderground's opinion that public interest in the issue in the spring of 2005 reached a suitable level only for a very short time, making it a poor candidate for an ad campaign that could take considerable time and expense to mount. *Id.* As counsel for WRTL explained in the January, 2006 oral argument in *WRTL I*, "each organization has to make an assessment with respect to the different issues that they want to be lobbying on and the—their pressing nature." Transcript of Oral Arg. at 9, WRTL I, 546 U.S. 410 (No. 04-1581).

[26]WRTL ran an anti-filibuster grassroots lobbying ad in January, 2006, when a filibuster of Supreme Court nominee Samuel Alito was threatened. It is the opinion of WRTL and of Barbara Lyons, based on her many years of experience in legislative matters, that the ad affected Senator Kohl's subsequent vote in favor of cloture. Record 76, Attachment 1 at 11 (2d Lyons Affid. ¶ 7).

cognizability).

WRTL has acknowledged from the beginning that, in communications other than its grassroots lobbying ads, both it and WRTL-PAC have made prior statements opposing Sen. Feingold, both as to his position on the filibusters and as a candidate, but as noted below, these separate statements by WRTL and by the legally distinct WRTL-PAC, *Cal. Med. Assoc'n v. FEC*, 453 U.S. 182, 196 (1981) (PAC is "is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."), are neither statutorily nor constitutionally cognizable in evaluating whether the ads at issue are "genuine issue ads." *See infra* at Part IV.C, n.68, n.70. WRTL has acknowledged from the beginning that it accepts some corporate funds. Some corporate funds were donated for the anti-filibuster campaign. However, this does not give rise to any corporate-fund conduit interest because corporations can do petitioning by genuine issue ads. *Bellotti*, 435 U.S. at 774.

As with the extended discussion of the timing of WRTL's ads, a discussion of the opinions of the defense experts is pertinent because it is a centerpiece of Appellants' argument as to "effect" of the ads on the election. Both of the FEC's expert witnesses recognize grassroots lobbying as discernible from electioneering.[27] While conceding the legitimacy of grassroots

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[27]Franklin considers grassroots lobbying as "for the most part" a subcategory of issue advocacy. JA 177. Franklin agrees that organizations that want to influence government policy often engage in grassroots lobbying, JA 180, and do so as a means to influence current office holders and how they vote in Congress. Record 81-2:215 (Franklin Dep. 43:3). Franklin agrees that communications that have three elements – they relate to specific legislation, reflect a point of view on the legislation's merits, and encourage the general public to contact legislators – "appear within grassroots lobbying," JA 178, 206, and offers that a definition should include "efforts to mobilize supporters" and "efforts to persuade the public" on a specific issue as grassroots lobbying as well. Record 81-2:214 (Franklin Dep. at 37:9-11). According to Franklin, a significant number of the ads in the spring of 2005 for and against judicial filibusters were designed to affect

lobbying advertisements, these experts drew broad conclusions about the admittedly unintended effects of such ads. *See* Record 81:38 (*FEC Mem. Supp. S.J.* at 30) (Experts "provided unrebutted testimony that, regardless of WRTL's effort to avoid overt electioneering in the actual ad text, WRTL's ads would likely have influenced the election if broadcast during the 2004 electioneering communication periods.").

But the district court found no practical or legal basis for accepting the "highly questionable assumption" that the "speculative conjecture" of such experts "can actually project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a. Among the experts' conjectures were that WRTL's grassroots lobbying would have had an electoral effect because of circumstances external to the ads or WRTL's plans, that any communication (regardless of mode or whether it even mentions a candidate) can have an electoral effect, and that the less a communication resembles express advocacy, the more effective it is as an electioneering communication.

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or influence the vote in the Senate on the filibuster issue, while some may have been more aimed at public opinion generally. Those ads that were directed or aimed at influencing the vote in the Senate mentioned a specific senator by name, pointed to his or her role in the debate, and were broadcasted primarily in the states where those senators were from. JA 174.

Douglas L. Bailey admits that groups can do grassroots lobbying, which he calls "public lobbying advertising," JA 139, when the position of an officeholder is undecided, JA 148, that it is customarily done when a bill or issue is before Congress, *id.* 142, that "increasingly" such ads mention the names of officeholders to be lobbied, generally in order to enable the public "to weigh in with" an undecided officeholder or to sway her position, *id.*; that they are targeted to districts or states, *id.*; and that WRTL's 2004 ads were public lobbying advertising. JA 151 (exhibits 5, 6 and 7 were scripts of the three 2004 ads). Bailey also acknowledged that the PBA ad was public policy advertising, JA 150-51 (Exhibit GIA 6 was the PBA Ad), and that the 2006 Filibuster Radio Ad concerning the Alito nomination filibuster was public policy advertising. JA 156 (Exhibit 9 was the 2006 Filibuster Radio Ad). Bailey acknowledged that public lobbying advertising "can be" successful in persuading a public official to change his position, adding that "[g]enerally, frankly, it's not, but it can be." JA 152.

Franklin could not determine that any given ad was intended to or would in fact affect an election.[28] He believes that the effect of grassroots lobbying on an election depends in large part on characteristics of the voters' attentiveness to politics and their predispositions, partisan or ideological. JA 191, and that if an ad is not countered by an opposing view, it is more likely that its message "will have a net effect on public opinion or vote choice." JA 207. In Franklin's opinion, the press releases of state Senator Bob Welch and comments of two other candidates and the Wisconsin State Republican Chairman, as reported in a news articles, made the subject of judicial nominations a "partisan issue." JA 226-27. He believes that the net effect of grassroots lobbying depends on the "baseline" or "salience" established by earlier communications. JA 175. He testified that if "issues are linked to the considerations" that voters have on their mind when going to vote, "then that topic or issue is likely to have a greater impact on their voting choice than if it is not salient to them at the moment." Record 81-2:223 (Franklin Dep. at 78:10-17). So under his view, regardless of a communication's content or medium, or whether it mentions a candidate, a speaker must ascertain the opposition to his

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[28] According to Franklin, the effect of grassroots lobbying "would depend in part on the setting and the nature of the effort," JA 206, and "one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another." *Id.* A fair summary of his report is that "the discussion of public policy issues can affect an election." JA 185. He offered that any communication to the public through any means can affect an election: telemarketing, phone calls, newspaper advertising, direct mail, web site information, radio and television advertising, even radio talk shows or news broadcasts, even when not mentioning a candidate or officeholder, can have an electoral impact, JA 186-87, but "[w]ithout empirical research, it's difficult to say how much [effect] any one of [these communications] would [have]."). JA 187. Franklin offered that a communication has an electoral effect or "electorally relevant impact" whenever it "deals with politically relevant issues," JA 187, and that a sincere intent to affect a policy position can still have an "overt . . . electioneering consequence." JA 210.

message and ascertain the voters' predispositions and how salient the issue he wishes to address has become to them in order to gauge whether his communication is electorally effective and therefore regulable.

In the opinion of Bailey, the other defense witness, an issue ad is "something that is hopefully going to have an impact on issues," JA 133. He believes that campaign ads include ads that do not mention the names of candidates, JA 134, and "an issue ad run in a campaign is a campaign ad," JA 133, because "[a]nything that happens in the course of a campaign . . . potentially has some impact on the campaign so that any ad run that relates to candidates or the issues in a campaign is going to have some impact on the campaign." JA 134. *See also* JA 132, 133 (campaign ad and issue ad can be the same thing), 157 ("ads that raise issues in relation to candidates . . . are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad."). He said that the "timing, . . . content and . . . obvious intent" of WRTL's Waiting Ad "obviously" made it a campaign ad, JA 148-49, despite agreeing that it (a) referenced a specific current legislative matter, JA 154, (b) only "implied" the Senators' position on the issue, and (c) was consistent with the possibility that one or both Senators were undecided, JA 148, (d) did not identify the Senators as candidates, JA 155, (e) contained no reference to Sen. Feingold's character, qualifications or fitness for office, JA 155, and (f) contained no words that promoted, supported, attacked or opposed him. JA 156.

In Bailey's view, six ads found to be genuine issue advocacy in the *McConnell* litigation,[29] which included the PBA Ad,

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[29]The six ads, herein referred to as the "genuine issue ads" or "GIA" ads, were identified in the report of *McConnell* Intervenor Defendants' expert, Kenneth M. Goldstein, as "Genuine Issue Ads" (defined by Goldstein as "ads coded as providing information or urging action"as opposed to "Electioneering Ads," defined as "generating support or opposition for a particular candidate"), Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants at 7. The six ads were considered genuine

were "all campaign ads" and would "inevitably . . . have some impact, maybe a little, maybe a lot, on an election . . . ." JA 145;159-67. He found that WRTL's ads "are probably more effective campaign ads" than the *McConnell* genuine issue ads because WRTL's ads "are not so obvious" and "are a little more subtle." JA 146.

Bailey was then presented with the sham Yellowtail Ad, Record 76:6, taken from *McConnell*, 540 U.S. at 193, n.78. JA 152. He concluded that, compared to the Yellowtail Ad, WRTL's Waiting Ad is "subtle[,] [i]mplies the position of the candidates . . . and is, therefore, more likely to be an effective . . . campaign communication." JA 154. The fact that the Waiting Ad referenced a specific legislative matter and urged contact with the referenced candidate to take a particular position on the matter while the Yellowtail Ad did not refer to any legislative matter and contained references to the character and integrity of the candidate led Mr. Bailey to opine that "I think that [the Waiting Ad] is a more effective campaign ad." JA 154. On a moment's reflection, these statements yield the remarkable proposition that, according to Bailey, the less an ad is like express advocacy, the more it is the functional equivalent of express advocacy and regulable. This stands *McConnell*'s narrow-tailoring functional equivalence test on its head.

The district court held the prohibition unconstitutional as applied to the three WRTL ads. JS App. 29a. While the court listed five factual topics that it would "at a minimum" examine "within the four corners of" an ad, JS App. 22a, those five topics were not in any way a general test. While the focus was on the four corners, there was a *relevant context* that was before the court.[30] Instead, the court found that: "the common denomi-

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issue ads by Goldstein's coders and he decided they were genuine issue ads. *McConnell*, 251 F. Supp. at 747-48 (opinion of Judge Kollar-Kotelly).

[30]The ***relevant context*** consists of the elements of the "electioneering communication" definition and prohibition, i.e., whether (a) the public official named is a candidate, (b) the communicator is a corporation (or union),

nator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the *link* between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office." JS App. 27a (emphasis added). "[T]he absence of that link . . . enables an issue ad to be fairly regarded as a genuine issue ad." *Id.* The district court's test focused on identifying genuine issue ads, of which grassroots lobbying is a subcategory with the additional constitutional protection of the right to petition.

During the prohibition period before the fall 2006 Wisconsin elections, WRTL sought another preliminary injunction to broadcast another grassroots lobbying ad. The "CCPA Ad" asked Wisconsin citizens to call Senators Kohl and Feingold about helping to finalize enactment of the Child Custody Protection Act (which had passed by wide margins in both houses but was then stalled by parliamentary maneuvering before finalization). That time Sen. Kohl was a candidate. This ad clearly stated the record of the candidates on the issue as follows: "Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not." *See* Bopp & Coleson, *Distinguishing* at 404 ("CCPA Ad" in Appendix) (emphasis in original). A preliminary injunction was denied and the district court declined to consider the ad along with the three anti-filibuster ads that it considered in the opinion now before this Court. Given the denial of WRTL's request to consider the ads together, WRTL filed another summary judgment motion as to the CCPA Ad, but the defendants have insisted to the court that they must have another round of intent-and-effect discovery of WRTL before they can proceed to respond. Record

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(c) the ad is broadcast, (d) the ad is targeted, and (e) the ad is broadcast within a prohibition period. In addition, as to grassroots lobbying there is the question of whether the communication concerns a current legislative or executive branch matter. The district court treated these relevant context facts as given, on the facts of this case, and so did not discuss them. By its "four corners" statement it indicated its rejection (on both practical and constitutional grounds) of any intent-and-effect context.

132:5. The court has not ruled on their motion.

SUMMARY OF THE ARGUMENT

While WRTL has forever lost the opportunity to broadcast its 2004 grassroots lobbying ads, it seeks recognition of constitutional protection for its ads so that the next opportunity will not be lost as well. This case is well within the exception to mootness because there is a reasonable likelihood that WRTL will again want to broadcast grassroots lobbying ads that qualify as electioneering communications. The experiences of this case and *CCLM* (06-589) demonstrate that such cases will evade review. The short-notice nature of grassroots lobbying makes it certain.

Appellants and their amici seek to shift the burden to WRTL to justify its ads. But the strict scrutiny burden is on the government because paying for grassroots lobbying from a PAC, or communicating with less effective means at less effective times, is a heavy burden on the right of the sovereign people to participate in self-government through their liberties of expression, association, and petition. Precedent specifically requires strict-scrutiny justification in such circumstances. *McConnell* employed strict scrutiny by (1) stating that the corporate-form interest is compelling as to restricting corporate express advocacy and (2) doing narrow tailoring by stating that sham ads were "the functional equivalent of express advocacy." But *McConnell* recognized that this analysis "might not apply to the regulation of genuine issue ads."

Strict scrutiny requires that the prohibition is narrowly tailored, in the least restrictive manner, to a compelling interest. However, WRTL's grass roots lobbying ads are not the "functional equivalent of express advocacy," because they are materially identical to the PBA ad, identified in *McConnell* as a genuine issue ad. Furthermore, grass roots lobbying has only a remote and speculative effect on elections and corporations have an independent First Amendment right to engage in such communications.

Furthermore, there are two less restrictive means that Congress could have employed, so that the prohibition fails strict scrutiny. One would be to require that electioneering communications be funded from a separate bank account (with no corporate funds) instead of from a PAC. WRTL offered to funds its ads from such an account, which would have eliminated the corporate-form interest. A second less restrictive means would be a test distinguishing grassroots lobbying that is not functionally equivalent to express advocacy.

Alternatively, the facial upholding of the prohibition in *McConnell* should be overturned because (1) the FEC and Intervenors contend that WRTL's genuine issue ads are in the "heartland" or "core" of what Congress intended to eliminate with the prohibition and (2) the experiences of this case and *CCLM* (No. 06-589) have demonstrated that as-applied challenges are an inadequate remedy to protect genuine issue ads

ARGUMENT

I. This Case Is Within the Mootness Exception.

The FEC claims that the 2004 ads are moot and not "'capable of repetition, yet evading review.'" *See* FEC Br. at 21 (citation omitted).[31] WRTL set the answer to this assertion before the Court in *WRTL I*, so that the issue was before this Court when it considered the case in January 2006. *See* Jur. Stmt. at 7 & nn.2 & 3; Br. of Appellant at 9 n.8, *WRTL I*, 546 U.S. 410 (No. 04-1581). Since "the case or controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate," FEC Br. at 21, this issue was before this Court in January 2006, long after the facts that the

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[31]In the district court, both Appellants claimed that this controversy was neither capable of repetition nor would evade review. JS App. 11a-12a. In April 2006, when asked to address mootness, the FEC characterized the issue as "a close question," Record 73:3 (*FEC Resp. Court's Apr. 17 2006 Order* at 3), while the Intervenors insisted that the controversy failed both prongs. Now the Intervenors concede justiciability, Intervenors' Br. at 13 n.7, and the FEC asserts mootness. FEC Br. at 24.

FEC now claims prove this controversy moot. *See* FEC Br. at 23-24. After remand, with the benefit of full briefing on the question, the district court ruled that WRTL's "predicament" was "a classic example of [this] well-established exception to the mootness doctrine." JS App. 12a.

As to "evading review," the relevant period has *proved* to be a "wholly unrealistic" window in which to reach final resolution of an as-applied challenge to the electioneering communication prohibition. JS App. 13a. This negates Appellants' contention that "[t]here is no reason to assume" that the controversy's recurrence will not evade review. FEC Br. at 24 n.6. Nor is presuming that a suit could be brought "well in advance" of the prohibition period warranted. *Id.* In fact, the controversy will likely *only* arise when it cannot be fully reviewed. As the district court pointed out,"legislation typically arises in the 30- and 60-day periods before a federal primary or general election." JS App. 15a (*citing McConnell*, 251 F. Supp. 2d at 793 (Leon, J.)). As-applied challenges[32] to the prohibition will therefore be brought on an emergency basis during the closing days of a campaign. *Id.* at 18a,19a. This case was filed before the electioneering communication prohibition period in 2004. Despite statutorily-required expedition "to the greatest extent possible," BCRA § 403(a)(4),[33] "[WRTL's] claims have

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[32]"The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). It is "appropriate" because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.*

[33]As of January, 2007, challenges to BCRA's provisions can be brought in district courts other than the District of Columbia's, and the expedition requirement applies only to those actions plaintiffs elect to bring in the District of Columbia. BCRA § 403(a) & (d), 116 Stat. 113-114. Accordingly, for those cases brought outside the District, the statutory expedition,

yet to be 'fully litigated.'" *Id.* at 13a. The two-year election cycle has "proved too short a period of time for appell[ee] to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Bellotti*, 435 U.S. at 774. So "it is entirely unreasonable, if not fanciful, to expect that a plaintiff could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day . . . [prohibition period]," JS App. 13a, and "a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." *Bellotti*, 435 U.S. at 774.[34]

As to "capable of repetition," this case readily fits within the exception to mootness because there is a "'reasonable expectation' . . . that the same *controversy* will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (emphasis added) (*quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The FEC misstates what "similar factual circumstances," *Bellotti*, 435 U.S. at 774, must be shown to be reasonably expected to recur, and ignores record evidence establishing that the relevant

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as insufficient as it has proved here, is not even required.

[34]To suggest, as the FEC does, that plaintiffs could obtain full review by forgoing a preenforcement challenge and instead subject themselves to enforcement actions and risk criminal prosecution, FEC Br. 24 n.6, flies in the face of the preenforcement doctrine. This Court has held repeatedly "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*quoting Steffel v. Thompson*, 415 U.S. 459, 459 (1974)). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.* at 298 (*quoting Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

factual circumstances will likely recur. The same controversy will arise when WRTL will again be subject to the "electioneering communication" prohibition when it needs to engage in grassroots lobbying, because then it "*will again be subjected to the alleged illegality.*" *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasis added). *See also Bellotti*, 435 U.S. at 774-75 (holding the capable of repetition prong satisfied where there was "no serious doubt that there is a 'reasonable expectation' that appellants again *will be subject to the threat of prosecution*" under the challenged law (emphasis added) (*quoting Weinstein*, 423 U.S. at 149)). The controversy will recur when the alleged illegality—an unconstitutional application of the prohibition and the coinciding threat of prosecution—recurs. The alleged illegal action will recur when WRTL wishes to run a targeted broadcast ad mentioning a candidate within the prohibition period, regardless of whether such an ad shares "the five characteristics that the district court found dispositive in sustaining [WRTL's] as-applied challenge." FEC Br. at 24. As in *Bellotti*, it is uncontroverted that the situation giving rise to the need to violate the prohibition will regularly recur. 435 U.S. at 774-76.[35] Legislative issues will typically arise in the prohibition period. JS App. 15a. WRTL intends to run materially similar grass-roots lobbying ads during those periods as necessary, and WRTL is concerned about a range of issues that

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[35]As was the case in *Bellotti*, "there is no reason to believe that the [enforcing agency] will refrain from prosecuting violations of [the prohibition]." 435 U.S. at 775. The prohibition is plainly applicable to the 2004 Ads and any "targeted" broadcast ad aired during the prohibition periods. There are no regulatory exceptions to the electioneering communication prohibition for grassroots lobbying, and WRTL "is subject to litigation challenging the legality of [its] actions if contrary to the Commission's rule" by a private party and without an FEC enforcement decision." *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (noting that 2 U.S.C. § 437g(a)(8) so provides). "Meanwhile, [the prohibition] remains on the books as a complete prohibition of corporate expenditures" for grassroots lobbying during the prohibition period, and "the effect of the statute on arguably protected speech will persist." *Bellotti*, 435 U.S. at 775.

regularly have and will become issues in the legislative and executive branch. Record 30 (*AVC* ¶ 16)[36] The relevant facts are capable of repetition and, therefore, the exception applies.[37]

II. Strict Scrutiny Applies.

Appellants and their amici attempt to shift their strict scrutiny burden to WRTL.[38] But this case involves a *prohibition*[39] that substantially burdens the people's rights to self-government using their liberties of expression, association, and petition. A politician who chooses to run for reelection wears two hats, the hat of office as the people's representative and servant and the campaign hat. Government continues to function during elections, and where a law burdens the people's right to participate in that government by petitioning the

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[36]Availability of PAC funds does not control the capable of repetition prong because WRTL challenges the very necessity of using them.

[37]The district court's reliance on "election-related challenges in which [the capable of repetition, yet evading review] exception was applied," JS App. 12a, is not misplaced. Controversies over "*electoral processes*," FEC Br. at 24, recur because electoral processes are part of *elections*, and elections recur. The transferable concept is that a process or activity inherently surrounding an election will recur. The controversy here will recur because elections, without which there is no prohibition period, will recur. In other words, if the controversy recurs at all, it will be in proximity to an election, and elections undeniably recur.

[38]*See, e.g.*, FEC Br. at 19, 28, 32-35; Intervenors' Br. at 30 (WRTL must prove PAC-option inadequate), 39 (WRTL must show "no reasonable prospect the ad is likely to influence the election," i.e., "differen[ce] in *kind*" (emphasis in original); Brifault & Hasen A.C. Br. at 24 (WRTL must "prove[] that the communication is unlikely to have any appreciable effect on voter's choices"); Dorsen et al. A.C. Br. at 13 (four elements of electioneering definition "satisf[y] government's burden [as to] purpose and perceived effect" so burden shifted to WRTL).

[39]WRTL did not challenge the electioneering communication *disclosure* requirements. *See supra* at n.18. But Appellants' amici curiae League of Women Voters et al. erroneously believe that this case is about *disclosure*. LWV et al. A.C. Br. at 14 ("all without disclosure"), 18 (same).

incumbent, the government bears the strict-scrutiny burden.

A. *Self-Government Right.* The prohibition burdens the self-government rights of the people. The people are sovereign. U.S. Const. preamble; *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to elect Senators directly. U.S. Const. amend. XVII. They mandated Congress not to restrict the peoples' rights to speak, associate,[40] and petition in exercising their sovereign rights. U.S. Const. amend. I.

B. *Expression Right.* The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley,* 424 U.S. at 14 (*quoting Roth v. United States,* 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Bellotti*, 435 U.S. at 777 n.12 (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

C. *Expressive Association Right.* While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying through broadcast ads is prohibited for some 90 days during an election year.[41] Citizen groups formed under the right

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[40]"[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

[41]The true temporal and geographic effect of the prohibition is broader than may first appear. *See* Bradley A. Smith & Jason Robert Owen, *Bound-*

of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[42] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by amplifying individual speech. *Id.* at 22.

D. *Petition Right.* Grassroots lobbying is also protected by a right not considered in *McConnell*, i.e., the right to petition. The right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (*quoting United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)). Grassroots lobbying is a quintessential exercise of the right to petition. *Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc. v. Pearson*, 390 F. 2d 489, 491 (D.C. Cir. 1968). The right

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ary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis, 20 Stan. L. & Pol'y Rev. 101 (2007).

[42]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

of corporations to petition both the legislative and executive branches was recognized in *Noerr*, 365 U.S. at 135. This Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not be a violation of the Sherman Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). In *Bellotti*, 435 U.S. 765, this Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, holding that it was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31. And as general advocacy of public issues, grassroots lobbying is protected under the First Amendment as part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times*, 376 U.S. at 270.

The government bears the burden of justifying statutes that target speech based on its content—especially speech at the core of our constitutional system of government—under the strict-scrutiny test. *See, e.g., Buckley*, 424 U.S. at 39, 44-45 ("exact-

ing scrutiny"); *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985). "Under the strict-scrutiny test, [the government has] the burden to prove that the [challenged provision] is (1) narrowly tailored, to serve (2) a compelling state interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (*quoting Brown v. Hartlage*, 456 U.S. 45, 54 (1982), and *citing Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989)). "In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "unnecessarily circumscrib[e] protected expression," *id.*, so that it is the least restrictive means to further a compelling interest. *See*, *MCFL*, 470 U.S. at 262 ("interest . . . can be met in a manner less restrictive").

E. *PAC Mandates Trigger Strict Scrutiny.* Specifically, where the government imposes a PAC mandate, as does the electioneering communication prohibition, the government bears the strict scrutiny burden of justifying this infringement on the peoples' liberty. The PAC-option is a serious burden and is inadequate, constitutionally and factually, as a means for communications that do not contain express advocacy or its functional equivalent.[43] In fact, where a corporation must use

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[43]*McConnell* held that the PAC-option "provide[s] corporations and unions with a constitutionally sufficient opportunity to engage in *express advocacy*," 540 U.S. at 203 (emphasis added), but *McConnell* never held that "genuine issue advocacy" is express advocacy, indicating rather by its substantial overbreadth analysis that the prohibition was facially constitutional because it did not sweep in a "substantial" number of "genuine issue ads." *Id.* at 205-07. In *MCFL* , this Court said that the PAC-option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring). In *MCFL*, the FEC clearly had the strict-scrutiny burden and advanced three interests that the Court rejected as not compelling or which could be met with less-restrictive, more narrowly-tailored means. *Id.* at 256 (corporate-form interest), 260 (protecting donors), and ("massive undisclosed spending" and "conduits" necessitating a "bright-

PAC funds for grassroots lobbying there is a tax on the expenditure.[44] And on the facts of this case, the PAC alternative was inadequate. WRTL had only a limited time to engage in grassroots lobbying in favor of an up-or-down vote on judicial nominees. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members, not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern. When a legislative issue arises on short notice, as here, there is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[45] and then raise PAC money from the

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line rule").

[44]The expenditure for a grassroots lobbying electioneering communication done by a PAC is subject to tax (at the highest rate). *See* IRS Rev. Rul 2004-6, 26 U.S.C. § 527. If the PAC does enough lobbying that lobbying becomes its major purpose, the PAC loses its tax exempt status and its connected corporation must pay a tax on all of the PACs expenditures (at the highest rate). Moreover, communications attributed to a PAC may not be distributed in churches, as doing so would affect their nonprofit status under federal law. 26 C.F.R. § 1.501(c)(3)-1(a)(i), 26 C.F.R. § 1.501(c)(3)-1(a)(ii)).

[45]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as

members through the multiple appeals required for fundraising. Record 76, Attachment 1:5 (Lyons Affid. ¶ 9). Nonprofit corporations organized under IRC § 501(c)(3) are not permitted to have a PAC. Where a corporation has a PAC, the PAC alternative is untenable where there is inadequate time to raise sufficient funds by appeals to existing members through the multi-step process of recruiting new members and then soliciting statutorily-limited contributions. *See supra* at n.46. The PAC requirement in such situations is a complete ban. But the presence or absence of PAC funds does not alter the fact that requiring the PAC-option mandates strict scrutiny, as this Court decided in *Austin*, noting that the Michigan Chamber of Commerce had raised substantial PAC funds but still mandating strict scrutiny. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990).

F. *McConnell* Employed Strict Scrutiny. Where a First Amendment facial overbreadth challenge is brought, this Court still requires a compelling interest and narrow tailoring. *McConnell* employed the strict-scrutiny analysis by first setting out the only compelling interest that justifies a *prohibition*, i.e., the corporate-form interest (only corporations are prohibited from paying for electioneering communications, as are unions for parity). *See* 540 U.S. at 205. The narrow tailoring analysis was done by analogy, which began by framing the corporate-form interest as an interest in regulating express advocacy, *id.* then stated the issue as whether "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206. The Court held that this "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* Only at this point did the Court begin the

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desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

overbreadth analysis, holding that plaintiffs failed to prove that the prohibition reached a substantial number of "genuine issue ads" as compared to the sham ads that were the "functional equivalent of express advocacy." *Id.* at 206-207. *McConnell* decided only a facial challenge to the prohibition so that no as-applied issues could have been resolved, and the Court held in *WRTL I*, 546 U.S. 410 (2006), that neither the language nor the logic of *McConnell* precluded a challenge to the prohibition as applied to grassroots lobbying. *McConnell* did not recognize that the government had met its strict-scrutiny burden as applied to the "genuine issue ads" that *McConnell* recognized. *See* 540 U.S. at 206 & n.88.

G. McConnell Did Not Create an Intent-and-Effect Test. The centerpiece of Appellants' argument is that *McConnell* approved an intent-and-effect test warranting a broad contextual investigation into the speaker's alleged true purpose. FEC Br. at 43; Intervenors' Br. at 21.[46] Their approach treats the actual text of the communication as essentially irrelevant. It is an empty vessel into which they pour discovered intent from an external context that is often beyond the speaker's control or even knowledge.[47] As shall be shown, the external context they

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[46]The Intervenors actually engaged in prestidigitation to make it appear that *McConnell* employed an intent-and-effect test instead of a functional-equivalence narrow-tailoring analysis by cut-and-paste rearrangement of what this Court actually said in *McConnell*. *See* Intervenors' Br. at 2, 9, 19 (substituting *McConnell*s intent-and-effect language where the functional equivalence language belongs in an apparent effort to substitute an intent-and-effect test for the functional-equivalence narrow-tailoring analysis). Where Intervenors do speak of functional equivalence, they repeatedly precede it with "likely," *see, e.g., id.* at 23 ("likely to function as express advocacy"), trying to substitute the weaker idea of "likely" functional equivalence for *McConnell*'s more demanding concept: "*are* the functional equivalent of express advocacy." 540 U.S. at 206 (emphasis added).

[47]If the application of the prohibition to a communication depends on the results of an external intent-and-effect investigation, then the prohibition is unconstitutionally vague as applied. No one could know when speech is protected. It should also be noted that the FEC in *WRTL I* expressly

urge is statutorily and constitutionally non-cognizable. But for present, note that *McConnell* created no intent-and-effect test.

It is, of course, true that after establishing functional equivalence as its narrow-tailoring analysis *McConnell* went on to say, "The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. This intent-and-effect language was merely descriptive of the sham ads that had just been declared to be "the functional equivalent of express advocacy" and is not (nor could it be) a constitutionally-permissible test in and of itself. The district court correctly held that the proper functional equivalence analysis is limited to "consideration [of] language within the four corners of the . . . ads." JS App. 22a.[48] It said that an intent-and-effect test is "practically unacceptable because as-applied challenges . . . must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." JS App.19a. "More importantly," the court added, "it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) . . . experts can *actually* project the 'likely' impact of a given ad on the electoral process." JS App. 19a-20a.[49] It wrote that the Supreme Court had already recognized

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eschewed an intent test. Br. for Appellee at 39, *WRTL I*, 546 U.S. 410 (No. 04-1581) ("A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.").

[48]There is, of course, the relevant context of the elements of an electioneering communication and whether the communication focuses on a current legislative or executive branch matter. *See supra* n.30.

[49]The district court expressed skepticism about expert prognostication after considering the efforts of two defense experts in this case. JS App. 19a-

that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." JS App. 20a. The district court pointed to the Supreme Court's rejection of an intent-and-effect test in *Buckley*, 424 U.S. at 43 (*citing* with approval *Thomas*, 323 U.S. at 535). JS App. 20a-21a.

McConnell did not purport in any way to overrule *Buckley* on this point, which is central to free expression, by referring to "intent" and "effect." 540 U.S. at 206. *McConnell* had already specifically connected this "intent" language to the sham "Yellowtail Ad" as being an ad "no less clearly intended to influence the election" than an express advocacy ad. 540 U.S. at 193 & n.78. So it was not creating a new "intent and effect" test for determining whether a communication is "the functional equivalent of express advocacy."

Rather, *McConnell* was simply citing language used by defense expert Kenneth Goldstein, who used student coders to separate ads provided to them into the categories of "Genuine Issue Ads" or "Electioneering Ads." *Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants* at 24, *McConnell*, 251 F. Supp. 2d 176, 2002 WL 33100340 (No. 02-581 and consolidated cases).[50] "Specifically, coders were asked whether the purpose of the ad was to 'generate support or opposition for candidate,' or to 'provide information or urge action.'" *Id.* at n.20. Based on the coders' perceptions and his analysis, Goldstein argued "that BCRA's definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office*." *Id.* at 26 (emphasis added). *McConnell* was plainly echoing that conclusion for purposes of its broad-brush facial-

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20a, *See supra* at 18-22 (discussing experts' opinions).

[50]Goldstein's report, as presented to this Court in Vol III of the Joint Appendix is available at http://www.law.stanford.edu/publications/ projects/campaignfinance/. In this Court's *McConnell* records, the report was in Defendants' Exhibits, Vol. 3, Tab 7.

challenge analysis as a mere description of those ads that were the "functional equivalent of express advocacy," not creating a new and constitutionally problematic test based on criteria this Court had already rejected.

Moreover, *McConnell*'s expert-endorsed PBA Ad, *infra* at n.65, was declared a "genuine issue ad" based on its content, not contextual probing into intent and effect. The same was true of all the ads coded by Dr. Goldstein's student coders for the *Buying Time* studies that were central to the *McConnell* evidence. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 307 (Henderson, J.) ("The students were asked to 'code' the ads based on their content."). And the Prime Sponsors Rule, a grassroots lobbying exemption rule proposed to the FEC in 2002 by Senators McCain and Feingold and other prime BCRA sponsors, likewise examined the four corners of a communication and required no contextual investigation into intent and effect. *See* Bopp & Coleson, *Distinguishing* at 407-08 (Appendix). So based on practicality, constitutional imperative, and the Appellants' failed effort to prove cognizable intent and effect through discovery and expert testimony, the district court rightly rejected any reliance on an intent-and-effect test to distinguish genuine from sham issue ads.

H. *McConnell Did Not Shift the Burden of Proof.* Another effort to shift the burden to WRTL attempts to extract from *McConnell*'s facial overbreadth analysis (i.e., how substantial was the prohibition's impingement on "genuine issue ads") a rule governing as-applied challenges (which were not at issue and not the topic).[51] The locus of this argument is *McConnell*'s statement about how substantial the prohibition of genuine issue

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[51]It should be recalled that the FEC and intervenors in *McConnell* urged the Court not to consider any as-applied challenges in that facial challenge, and then the FEC insisted in *WRTL I* that no as-applied challenges were permitted, which the Chief Justice termed "a classic bait and switch." Transcript of Oral Arg. at 25, *WRTL I*, 546 U.S. 410 (No. 04-1581). So *McConnell* could not have decided as-applied challenges, and especially not in the midst of a *facial substantial overbreadth* analysis.

ads might be in the future: "Moreover, whatever the *precise percentage* may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206 (emphasis added).

The reference to "precise percentage" at the beginning of this sentence (often excluded by those attempting to convert this facial overbreadth analysis into an as-applied statement) indicates that this sentence is about the facial challenge question of how substantial was the alleged overbreadth. This sentence, within the discussion of just how many genuine issue ads were captured by the prohibition as compared to sham issue ads, began by noting that "[t]he *precise percentage* of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court." *id.* (emphasis added), and concluded that the "*vast majority*" of ads were not genuine issue ads. *Id.* (emphasis added). The italicized words about "percentage" and "majority" clearly indicate that the "in the future" comment was *only* about the substantiality of the alleged overbreadth. It could not have been about future as-applied challenges in any event, because neither future cases nor as-applied challenges were before the Court.

So the "in the future" comment, in context, was about lack of overbreadth in the future. The Court was considering the "percentage" of "genuine issue ads" that would be captured by the prohibition (as compared to the "sham issue ads" that *McConnell* recognized were the intended target of the prohibition) in order to determine whether the overbreadth was sufficiently broad for facial invalidation. After noting that the experts had fought over the "precise percentage," the Court declared that prospectively the overbreadth could be reduced in any event because, with knowledge of the prohibition, speakers

could take measures to avoid the prohibition's reach in some situations.[52] But this "in the future" statement could not apply to *all* situations because the Court immediately left open as-applied challenges by recognizing the category of "genuine issue ads" and expressly stating that it "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. *See also WRTL I*, 546 U.S. 410 (as-applied challenges permitted despite argument based on "in the future" statement).[53] So the meaning of the "in the future comment" is confined to its context and simply means that prospectively the

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[52]Judge Leon used nearly identical "future" language in holding that the primary definition of electioneering communication was unconstitutionally overbroad and likely to be higher in a "particularly contentious, or active, legislative period." 251 F. Supp. 2d at 798-99. "[T[here is reason to believe that the amount of issue advocacy likely to be generated *in future election cycles* will be at least as substantial as it was during those years," he continued. *Id.* at 799 (emphasis added). The Supreme Court was simply answering Judge Leon's argument by saying that "in the future" percentages might actually drop in light of people's knowledge of the elements of the prohibition, making overbreadth less substantial.

[53]The "in the future" comment was part of the two-part facial overbreadth analysis for which *McConnell* cited 540 U.S. at 207, the leading case of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *McConnell* summarized its holding under the two parts as follows: "Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or *relative to its application to election-related advertising*, the record strongly supports the contrary conclusion." 540 U.S. at 207 (emphasis added). The discussion of "pure issue ads," *id.*, or "genuine issue ads," *id.* at 206 & n.88, was to establish that the prohibition was not overbroad in the context of "election-related advertising," *id.* at 207, which included both "electioneering ads" and "genuine issue ads," to use the terminology of defense expert Goldstein in his report in the *McConnell* litigation. Consequently, this Court was required by its analysis to talk about "genuine issue ads" in its facial overbreadth analysis. It was not gratuitously throwing in words about "genuine issue ads" that were irrelevant to its analysis and intended to be employed outside that context. Its "in the future" sentence had a distinct meaning in the facial overbreadth analysis context, but none beyond it.

overbreadth of the prohibition is not sufficiently substantial for facial invalidation. The comment may not be ripped from its context and forced to mean things entirely foreign to its plain contextual meaning. The comment does not shift the strict scrutiny burden from the government and force challengers to prove that the mentioned options are inadequate. It does not say that the other options are adequate for genuine issue ads. In fact, the Court clearly held that the PAC option was "constitutionally sufficient" only as to "*express advocacy*." 540 U.S. at 203 (emphasis added). Only to the extent that an ad can be proven by the government to be the "functional equivalent of express advocacy," *see id.* at 206, is the PAC option adequate. So *McConnell* only employed facial overbreadth analysis to sustain the prohibition and left for another day distinguishing "genuine" from "sham."[54]

There are also burden-shifting efforts to equate this case to cases where groups to which a *disclosure* provision would validly apply must demonstrate that they should be exempted

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[54]Another attempted burden-shifting argument is to the effect that once a facial challenge has been rejected no exception may be granted that goes to the core of what the prohibition sought to limit. FEC Br. at 18, 32, 38-39. The BCRA legislative history, the 2002 FEC electioneering communication rulemaking, and the *McConnell* litigation clearly reveal that (a) *sham* ads were the target of the prohibition and "genuine issue ads" were to be protected and (b) genuine issue ads can be distinguished from sham ads. *See infra* at Part IV and Bopp & Coleson, *Distinguishing* at 365. Since WRTL's ads are clearly "genuine issue ads" like the PBA Ad, this burden-shifting argument fails and, to the extent that these ads are at the "core" or "heartland" of the prohibition, then the facial upholding of the prohibition must be overruled. *See infra* at Part V. Another attempt to shift the burden is based on the notion that once a provision is upheld facially then all as-applied challenges shift the burden to the challenger (on the notion that because a communication here falls within the electioneering communication prohibition it must be considered presumptively a sham ad and the burden immediately shifts to WRTL to prove it is a genuine issue ad). *See* FEC Br. at 33-34. This flies in the face of this Court's unwavering requirement that burdens on First Amendment liberties must be justified by the government.

from disclosure because it would put their members at risk.[55] But such a balancing of harms is not appropriate to this case because the prohibition does not validly apply to "genuine issue ads," of which WRTL's are examples.[56] As to such genuine issue ads, the asserted interests are not compelling, and even if they were, the prohibition is not a narrowly-tailored, least-restrictive means of dealing with the asserted interest. *See* Part III. So this case is like *MCFL*, where (a) the FEC's asserted corporate-form interest was held not compelling as to *MCFL*-corporations, (b) the FEC's asserted interest in a bright-line test was held not compelling at all, and (c) the FEC's asserted interest in protecting donors was held neither compelling nor served by the prohibition when there were less restrictive means. *MCFL*, 479 U.S. at 259, 263, 260-61 (respectively).

I. *The Avoidance-Option Is Inadequate.* As just demonstrated, *McConnell*'s "in the future" comment (a) was only about the substantiality of asserted overbreadth, (b) could not have decided any future as-applied case, and (c) did not shift the burden to WRTL. *See supra* at Part II. And requiring WRTL to avoid using grassroots lobbying communications that meet the electioneering communication definition (the "avoidance-

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[55]Examples of such cases are *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982).

[56]Even under a balancing of harms test, however, "genuine issue ads" must be protected because in a republic the people's sovereign right to participate in self-government through the express liberties of expression, expressive association, and petition of their representatives clearly outweighs the interest of incumbent politicians in avoiding (at most) being criticized for their official actions near an election, in which they have chosen individually to run for reelection and collectively to remain in session (and highly active legislatively) in the periods preceding elections. And even if it were proper to shift the burden of proof, WRTL has established that its "genuine issue ads" pose no cognizable risk to the integrity of elections that would justify the prohibition and that a judicial test may be stated for future ads. *See infra* at Part IV.

option") or to justify why those options are not suitable would impose such a burden on WRTL's constitutional rights that it would itself trigger strict scrutiny because these alternatives are all less effective and constitutionally inadequate.

1. Not Broadcasting Is Inadequate. Using alternative means of communication, such as newspaper ads, is inadequate. Judge Kollar-Kotelly found in *McConnell* that broadcasting is the most effective means for the sort of communications at issue here. 251 F. Supp. 2d at 569-73. The obvious reason why Congress banned only broadcast ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, with many years of experience in promoting WRTL's issues, Record 76, Attachment 1 at 10 (2d Lyons Affid. ¶ 1), verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message," Record 30:10 (*AVC* ¶ 51), which WRTL's advertising consultant confirmed. Record 81-2:156 (Vanderground Dep. 14:21-17:8); Record 81-2:171 (Vandergound Dep. 76:12-77:5). And it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

2. Non-Incorporation Burdens the Association Right. The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form for these groups is the nonprofit corporation, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's

right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

3. Other Times Are Inadequate. Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. In this case, the blackout period was for 80 days and it is important to run the advertising up to the time of the vote. *See supra* at 12-17 (and the level of public interest is a prime consideration, too). Grassroots lobbying is customarily done when a bill or matter or an issue is directly before the Congress and it tends to be run in the period leading up to the scheduled votes. *Id.*

4. Not Naming a Candidate Is Inadequate. Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of Congress, so would not know whom to call. A statute requiring that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective. As the evidence in this case shows, naming a candidate is typical in grassroots lobbying and is needed. *See supra* at 18-19.[57] So it would not

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[57]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM

have been as effective for WRTL to simply direct recipients to the Senate switchboard or to the BeFair.org website to find out who to lobby.

5. Not Targeting Is Inadequate. Grassroots lobbying must target the constituents in order to be effective because these constituents are the members of the public to whom the public official is responsible.

III. The Prohibition Fails Strict Scrutiny as Applied.

For restricting activity at the core of the American system of representative government, no blunt instruments are permitted. *MCFL*, 479 U.S. at 264-65. Appellants must establish that the prohibition as applied is the narrowly tailored, least restrictive means, to further a compelling governmental interest. *See, e.g.*, *White*, 536 U.S. at 774-75; *MCFL*, 470 U.S. at 262.

A. *Asserted Interest.* *McConnell* pointed to the already recognized "compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," 540 U.S. at 205, to which sham issue ads were

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states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, [illegible]hell, Special Assistant for Public Affairs to the AFL[illegible]red, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

the "functional equivalent." *Id.* at 206. But since only *corporations* are prohibited (and unions for parity) from funding electioneering communications, the interest actually underlying the prohibition is the corporate-form interest, which *McConell* acknowledged: "The . . . question— whether the state interest is compelling—is easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (quotation marks and citations omitted). So the issue is whether (1) the corporate-form interest is compelling here and (2) the prohibition is the narrowly-tailored, least-restrictive way to protect the corporate-form interest (if compelling) as to a "genuine issue ad," such as the WRTL's ads.

B. ***Narrow Tailoring.*** As demonstrated in Part IV. WRTL's ads are not the "functional equivalent of express advocacy," *Id.* at 206, because they are "genuine issue ads,"*Id.* at 206 n.88, not shams. Rather, they are grassroots lobbying. The concern about such ads affecting elections, which is the corporate-form interest identified in *McConnell*, is not present, *see Austin*, 494 U.S. at 678 (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other"), and so does not apply. There is no corruption flowing from corporate efforts to lobby legislative or executive branch officials. *See Bellotti*, 435 U.S. at 776-78, 790-96, *Noerr*, 365 U.S. at 135, 137-38.

C. ***Less Restrictive Means.*** Strict scrutiny of the prohibition readily reveals two less restrictive means of dealing with the corporate-form concern and the overlaid functional-equivalence concern. The first eliminates the corporate-form concern by eliminating corporate money, which is discussed here. The second, which is the focus of Part IV, retains corporate money but eliminates the functional-equivalence concern by defining grassroots lobbying narrowly. These are sufficient to show that

the prohibition is not narrowly tailored as applied.

When it enacted BCRA, Congress had before it one less restrictive means of eliminating any concerns about corporate-form corruption, namely, "a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications . . . ."[58] WRTL stated in its complaint that it would make all disbursements for electioneering communications from such an account if the court would not grant relief from the prohibition as to disbursements from its general account. Had Congress enacted this segregated bank account option in place of the prohibition, Congress would have entirely eliminated corporate-form corruption concerns because the corporation would not have been using any money from business activity or receipts from other corporations. Therefore, the prohibition is unconstitutional as applied.[59]

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[58]2 U.S.C. § 434(f)(2)(E). Congress said that an entity permitted to broadcast electioneering communications and required to report disbursements for them, would only have to report contributors of $1,000 or more to that *account* (as opposed to general fund donors) if it made its disbursements for electioneering communications from such a segregated bank account.

[59]Yet another means that would be less restrictive on the people's First Amendment liberties would be for Congress to recess during elections along the British model, e.g., Congress might recess for sixty days before general elections and thereby reduce the need for grassroots lobbying during these times. Two Appellants' amici curiae have suggested a shorter prohibition period. *See, e.g.*, Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1802 (2001) ("[n]arrow drafting may include shorter time periods (for example 30 days rather than 60 days"). It must be remembered that part of the perceived problem that is set out to justify the prohibition is based on matters out of the hands of the people, namely, (a) Congress remains in session in prohibition periods, (b) prohibition periods are particularly intense and important legislative times, *see* 251 F. Supp. 2d at 911 (Leon, J.) (prohibition periods "are often periods of intense legislative activity" and "[s]ome of the

D. *McConnell's Other Concerns Not Implicated.* Grassroots lobbying does not implicate *McConnell*'s other expressed concerns about "sham issue advocacy." 540 U.S. at 132. First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

This case implicates none of these concerns. Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31. "The First Amendment rejects the 'highly 'paternalistic' approach . . . ." *Id.*

Furthermore, the desirability of a "bright-line rule" does not defeat this as-applied challenge. This Court has already held that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in origi-

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President's or Attorney General's boldest initiatives are advanced during election years—often within 60 days of an election"), and (c) incumbents become candidates because they choose to run for reelection.

nal).[60] However, a bright line favoring, rather than suppressing, expression, association, and petition is helpful to the people, and one can be developed, as shown next.

IV. Genuine Issue Ads Can Be Adequately Identified and Exempted from the Prohibition.

As the district court correctly held, the prohibition may not constitutionally be applied to WRTL's ads because they are neither "the functional equivalent of express advocacy," JS App. 26a (*citing McConnell*, 540 U.S. at 206), nor was there any "link" between the ads and Sen. Feingold's fitness for office. JS App. 27a. Such genuine issue ads can be adequately identified and exempted from the electioneering communication prohibition. *See also* Bopp & Coleson, *Distinguishing* at 386 (setting out suggested test with analysis).

A. *The Unfulfilled Promise.* A promise was made by BCRA's sponsors, when Congress debated the electioneering communication prohibition, that "genuine issue ads" and the subset of grassroots lobbying would not be prohibited. "Genuine issue ad" was a term of art used throughout BCRA's enactment and the *McConnell* litigation, including by this Court. 540 U.S. 206 n.88 ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."). *See supra* at 7-8 (use as a term of art by *McConnell* experts and lower court).

Senator Jeffords (who introduced the Snowe-Jeffords amendment that became the prohibition) declared on the Senate floor that the prohibition

> will not affect the ability of any organization to urge *grassroots contacts* with lawmakers on upcoming votes. The Snowe-Jeffords provisions do not stop the ability of

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[60] In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*. 479 U.S. at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

> any organization to urge their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their *grassroots communications* to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task.

147 Cong. Rec. S2813 (emphasis added).

Co-sponsor Sen. Snowe said: "[L]et's look at the *genuine issue ad*, . . . which this provision would not apply to." 147 Cong. Rec. S2458 (emphasis added). Senator Paul Wellstone in offering an amendment to the Snowe-Jeffords Amendment that would eliminate an exemption from the prohibition for non-profit organizations (under I.R.C. §§ 501(c)(4) or 527) declared that genuine issue ads were not the target: "I am not talking about ads . . . that are legitimately trying to influence policy debates." 147 Cong. Rec. S2846. He emphasized his point by repetition, "I am not talking about legitimate policy ads. I am not talking about ads that run on any issue." *Id.*

From these statements by BCRA's prime sponsors of the electioneering communication prohibition, it is clear that the congressional intent was to exclude grassroots lobbying ads. But Congress left creation of the exemption to FEC rulemaking, giving it authority to make exemptions, provided that no exempted communication "promotes or supports . . . or attacks or opposes a candidate" (called "PASO"). 2 U.S.C. § 434(f)(3)(B)(iv). So when the FEC did its 2002 electioneering communications rulemaking it solicited comments on four proposed alternatives for a grassroots lobbying exemption. 67 Fed. Reg. 51131. *See* Bopp & Coleson, *Distinguishing* at 407 ("FEC Proposed Rules for Comment" included in Appendix collecting rule proposals).

The BCRA prime sponsors proposed specific wording for a grassroots lobbying exemption and told the FEC that it had authority to enact their rule under BCRA. *Id.* at 407-08 (Prime

Sponsors Rule in Appendix).[61] This lends weight to the legislative history indicating that a grassroots lobbying exemption was intended, and it reveals that the prime sponsors believed that a rule could be fashioned that would meet the statutory PASO requirement.

But the FEC decided that the prime sponsors' statement that their rule complied with congressional intent as to the PASO standard was wrong, "conclud[ing] that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate." Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002). What governed under this FEC statement was hearer perception, and the FEC's apparent belief that any reference to an issue and a candidate could be viewed as influencing an election. As a reult, the FEC's understanding of PASO clearly encompassed communications having only the remotest speculative possibility of some minimal electoral effect.[62] The FEC's extremely broad PASO interpretation was a precursor to the FEC's position here that

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[61] *See also Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Mai T. Dinh of the FEC (Aug. 23, 2002)), available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[62] One effect of the FEC's refusal to make a rule was that it retained the sole authority to make any exceptions through the advisory opinion mechanism. The FEC made an exception to the prohibition when it said, in FEC Advisory Opinion 2004-31, that candidate Russ Darrow, Jr.'s name could be used in what were otherwise electioneering communications by the automobile dealerships that he founded and that bore his name, but were now under the day-to-day control of his son, Russ Darrow III. Of course, the self-government rights at issue herein go far beyond such commercial speech. Another effect is that grassroots lobbying during prohibition periods, especially the highly active legislative period before general elections, seems to have largely disappeared, likely due to the burdens of the PAC option.

now (1) sees a genuine issue ad as an empty vessel into which it can pour PASO intent based on an investigation into external matters that are neither statutorily nor constitutionally cognizable and (2) believes it can regulate anything having some speculative, remote electoral effect. *See supra* at 19.

In 2006, the FEC twice rejected requests to make a rule protecting genuine grassroots lobbying, *see* Bopp & Coleson, *Distinguishing* at 360-61, even after this Court in January of that year expressly pointed to the FEC's authority to promulgate a grassroots lobbying exception. *WRTL I*, 546 U.S. 410, 126 S. Ct. at 1017. At the *WRTL I* oral argument, Justice Breyer noted that "[Congress] told the FEC to go and produce a set of regs that would, in fact, try to screen out that legitimate 7 percent [of genuine issue ads]," and then asked the Solicitor General, "why haven't they done it?" Transcript of Oral Arg. at 43-44, *WRTL I*, 546 U.S. 410 (No. 04-1581).

B. *The Concession.* Senator McCain and other BRCA Prime Sponsors submitted a rule in the 2002 FEC rulemaking, which was joined by counsel and groups briefing this case and which focused on the text of the ad itself (along with the relevant context, *see supra* at n.30, not on an external intent-and-effect context.[63] The Center for Responsive Politics

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[63]**Prime Sponsors Rule:** In the 2002 FEC rulemaking on electioneering communications, the BCRA prime sponsors (**Sen. McCain**, Sen. Feingold, **Rep. Shays**, **Rep. Meehan**, et al.—bolded names representing intervenors in the present case) proposed the following rule for an exemption as being within the FEC's authority and properly distinguishing genuine from sham grassroots lobbying:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or

proposed a similar rule, only it allowed communicators to actually name the person who was the target of the grassroots lobbying. *See* Bopp & Coleson, *Distinguishing* at 408 (text of CRP Ad). In light of these prior proposals conceding (a) that genuine issue ads can be distinguished from sham ads and (b) that the distinction can be made on the basis of a four-corners rule (with relevant context) and without any intent-and-effect investigation, it is surprising to see the Intervenors, their counsel, and amici now trying to switch sides. A distinction is clearly possible, and it can be done on a four-corners rule. *See also* Bopp & Coleson, *Distinguishing* at 381-84 ("Necessity of Focusing on the Text").

C. *Cognizable Effect.* In formulating a test for genuine issue ads, the mere possibility of some incidental, de minimis effect on an election would not be constitutionally cognizable as a governmental interest. The FEC has already conceded this before the Supreme Court in *WRTL I* when Justice Scalia asked: "You think Congress has the power to prohibit any First

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executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain [et al.] at 10.

The following participants in present briefing joined in proposing this rule: The Campaign and Media Legal Center (**Campaign Legal Center**), *see* Letter from Glen Shor to Mai T. Dinh at 10-11 (Aug. 21, 2002) (**Trevor Potter** named therein as General Counsel); **Common Cause** and **Democracy 21**, Letter from **Donald J. Simon** to Mai T. Dinh at 12 (Aug. 22, 2002) (adding that "this proposed exception properly balances the competing concerns" and avoids "sham communications"). Comments available at http://www.fec.gov (archive re electioneering communication rulemaking).

Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?" Transcript of Oral Arg. at 31, *WRTL I*, 126 S. Ct. 1017 (No. 04-1581). The Solicitor General responded: "No, Justice Scalia, it's not." *Id.* And after extensive discovery and employing two experts, the FEC could only come up with the possibility that WRTL's ads might have some unquantifiable "electoral effect."[64] The district court reviewed the FEC's best efforts to prove this electoral effect at summary judgment and then rejected the "highly questionable assumption[] that . . . the speculative conjecture of experts can *actually* project the 'likely impact' of a given ad on the electoral process," for which assumption it did not find "sufficient evidence." JS App. at 20a (emphasis in original). So the government could not meet its strict scrutiny burden to prove that it has a cognizable interest in regulating WRTL's ads.

D. *The Prototype.* Since the PBA Ad[65] was identified by the

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[64] *See, e.g.*, Record 81:17 (FEC Mem. Supp. Mot. SJ at 9) (FEC argued that the ads "would likely have had a significant electoral effect."). But what Bailey said at deposition was that WRTL's "Waiting" ad "*could* have, *could* have, it *might have no impact*, but *could* have substantial impact on the election itself." JA 148(emphasis added). Moreover, when called upon to compare the Waiting Ad, JS App. at 5a n.5 to the PBA Ad, *infra* at n.65, Bailey thought that WRTL's ad was more subtle and so might be more effective in influencing elections, JA 147-48, which, by logical extension, yields the remarkable proposition that the *less* an ad is the functional equivalent of express advocacy the stronger the government interest is in regulating it.

[65] **PBA Ad:** This was called the "Feingold Kohl Abortion 60 Ad," but as its topic is partial-birth abortion ("PBA"), that name is more memorable:

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or

FEC experts in *McConnell* as a "genuine issue ad," and since it was a grassroots lobbying ad run by a pro-life group that also mentioned Senators Kohl and Feingold, it provides the logical prototype for determining the factors that identify genuine issue ads. *See* Bopp & Coleson, *Distinguishing* at 385-86 (more fully discussing following proposal). It serves as both a good pattern for creating a test and a benchmark for determining if other elements are required.

In particular, the PBA Ad has three essential features that establish that it is a grassroots lobbying ad that may not constitutionally be prohibited under § 441b as an electioneering communication. *First*, based on the content of the communication, it focuses on a current[66] legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity. *Second*, the ad does not mention any election, candidacy, political party, or challenger, or the official's character, qualifications, or fitness for office. *Third*,

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> manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

McConnell v. FEC, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J.) ("[sic]" included in Henderson opinion).

[66] *Current* requires that the ad not talk about a past issue, but one under current consideration, which *McConnell* district court judges found to be a useful way to distinguish genuine from sham issue ads. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 577 (Kollar-Kotelly, J.) (rejecting ad as genuine for "failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting"), 918 (Leon, J.) (examples of "candidate-centered ads" cited past votes of legislators). This requirement eliminates the "Jane Doe" ad cited in *McConnell* as being a sham. 540 U.S. at 126-27.

as long as the ad follows this pattern, the fact that the ad states the position of the candidate on the matter, which is objectively accurate and based on publicly available means of verification, and praises or criticizes the candidate for that position, does not effect its genuineness.

Analytically, the first part makes the ad a grassroots lobbying ad and, by its "focus," eliminates cognizable electoral effect. The second part further assures a lack of such cognizable effect, by not mentioning anything about the election or "the official's character, qualifications, or fitness for office." And the third part allows a forceful discussion of the merits of the matter, which merely say that the public official is wrong or right on the issue, not wrong for office.[67]

E. *WRTL's Ads Meet the PBA Ad Test.* WRTL's ads are materially indistinguishable from the PBA ad. *First*, WRTL's ads focus on a current legislative branch matter, take a position on the matter, and urge the public to ask their two Senators to take a particular action with respect to that matter in their official capacity. *Second*, the ads do not mention any election, candidacy, political party, or challenger, or the Senators' character, qualifications, or fitness for office. *Third*, while

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[67]For example, in *Christian Civic League of Maine, Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), the Crossroads Ad at issue said, "Unfortunately, your senators voted against the Marriage Protection Amendment two years ago." *See* Bopp & Coleson, *Distinguishing* at 404 (text of Crossroads Ad in Appendix), The district court, however, erroneously adopted the FEC's argument in stating that "the League's advertisement – which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as "[u]nfortunate[]" – is the sort of veiled attack that the Supreme Court has warned may improperly influence an election" and so pronounced it a "sham." *CCLM*, 433 F. Supp. 2d at 89 (opinion denying motion for preliminary injunction). Even though Sen. Snowe was running unopposed in a primary election, the district court insisted that "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." *Id.*

permissible, the ads do not state the position of the candidate on the matter, nor do the ads praise or criticize the candidate for that position.[68]

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past. The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even a *McConnell* defense expert concluded that an ad mentioning a

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[68]Material at the website www.BeFair.Org cannot be incorporated by reference into the WRTL ads because the FEC has never combined different communications to create express advocacy and cannot now do so with electioneering communications (although WRTL's ads would remain genuine issue ads even if the importation were permissible). Each communication stands on its own as to content, which means that other WRTL communications (on the website or elsewhere) cannot be combined with the ads to manufacture absent content in the ads. *MCFL* provides the example. If one of MCFL's newsletters had said "vote prolife" and another said "candidate X is prolife" (as in a voter guide), no express advocacy would have occurred, but if both things were said in the same communication then it would contain express advocacy. *See MCFL*, 479 U.S. at 249. In the last election, AARP ran its "Don't Vote" campaign, which consisted of broadcast ads telling people not to vote until they had visited AARP's website to see the position of the candidates on the issues. If the naming of candidates at AARP's website were incorporated by reference, then AARP's broadcast ads were electioneering communications. Until the FEC brings an enforcement action against AARP, the argument that what is said at BeFair.org is incorporated by reference in WRTL's ads cannot be taken seriously. In any event, the website contained no express advocacy, but did contain numerous ways to contact the Senators (including emailing from within the website), helpful information on federal courts, the judicial nomination process, filibusters, and judicial emergencies. *See* http://web.archive.org/web/20040729081130/http://www.befair.org/.

candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold even more and indicating that the issue was filibustering, not Sen. Feingold. The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue.

Defense expert witness Bailey, agreed that the ads were grassroots lobbying ads, JA 151, referenced a specific current legislative matter, JA 154, did not identify the Senators as a candidates, JA 155, and contained no reference to Sen. Feingold's character, qualifications or fitness for office. JA 155. At most, Bailey thought the ads only "implied" the Senators' position on the issue, since the ads were consistent with the proposition that one or both were undecided, JA 148,[69] and contained no words that promoted, supported, attacked or opposed them. JA 156.

F. The FEC's Erroneous Subjective Intent Test. The Appellants contend that the alleged subjective intent of WRTL and the ads alleged electoral effect should be considered, not just the content of the ads. In so doing, Appellants contend that the court should look to external factors such as the activities of WRTL's PAC,[70] statements in WRTL's press releases and

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[69]The fact that WRTL's Ads asked people to call Senators Kohl and Feingold about the filibustering implies nothing about the Senators' positions on the issue. Grassroots lobbying is used to firm up legislators' positions as well as to attempt to change them. So there can be no implication of criticism of either Senator because judicial filibustering was criticized in the ads.

[70]As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity, activity of a separate legal entity, *Cal. Med. Assoc'n*, 453 U.S. at 196, in determining whether a

newletters,[71] and the campaign statements of opposing candidates, political parties and other public officials.

This Court has consistently rejected this ar gument. In *Buckley*, express advocacy was to be found based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . ."). In so doing, Court rejected a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. (internal quotation marks and citation omitted). This Court applied this analysis in *MCFL* by only looking to the text of MCFL's newsletter to find that it contained express advocacy. 479 U.S. at 249.[72]

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corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)).

[71]This is an unconstitutional condition, i.e., if you want this benefit you must give up that right, *see, e.g., Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958), in this case requiring a tradeoff of constitutional rights instead of benefits.

[72]MCFL had a PAC, 479 U.S. at 255 n.8, but this Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *MCFL*, 479 U.S. at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But this Court never considered any such activity in determining whether there was an independent expenditure. Instead the

As to the "electioneering communication" provision, the law again requires examination of the communication itself and the relevant context (i.e., the factual elements making up the definition). "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Nowhere in the definition is there any instruction to see whether the organization's PAC or press releases said. And this Court in *McConnell* upheld the provision based only on an examination of the texts of ads broadcast during the black out period. 540 U.S. at 203-07.

Moreover, the *Noerr-Pennington* line of cases agrees that, where the right to petition is involved, intent and effect cannot be considered. Even in the context of federal antitrust and labor relations law,[73] where no additional First Amendment rights attach, the government cannot prohibit activities, that would otherwise violate antitrust or labor law, when those actions are "'an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'" *BE & K*, 536 U.S. at 525 (*quoting Noerr*, 365 U.S. at 136). These grass roots lobbying activities were protected "*regardless of intent or purpose.*" *Id.* (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added). Thus, in this grassroots lobbying case, the alleged intent or purpose of WRTL is also irrelevant.

Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. The sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other communications.

[73]The protection for grassroots lobbying recognized in the *Noerr-Pennington* line of cases has been extended to "situations where groups use . . . courts to advocate their causes and points of view," *Cal. Motor Transport*, 404 U.S. at 511, to the context of labor relations law, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737, 743 (1983), and where groups used the court to advocate in the context of labor relations law. *BE & K*, 536 U.S. 516.

V. *McConnell*'s Facial Upholding Should Be Overturned.

In *McConnell*, this Court rejected a facial challenge to the electioneering communication prohibition on the grounds that, even though "the interests that justify the regulation of campaign speech might not apply to the regulation of issue ads," the statute's application to genuine issue ads did not render it facially overbroad. 540 U.S. at 206-07 & n.88. The arguments raised by Appellants reveal that the *McConnell*'s facial upholding is incorrect for two separate and independent reasons. First, because Appellants' urge that the electioneering communication prohibition directly targets genuine issue ads, such as WRTL's, it is now clear that the statute's application to genuine issue ads is substantial. *See id.* at 207-08. Second, even if the statute's overbreadth is still not substantial, the as-applied remedy has proven to be inadequate to protect the exercise of core First Amendment rights. This Court should therefore either render the as-applied remedy meaningful by creating a test fully protective of citizens' right to engage in genuine issue ads, or overturn *McConnell*'s facial upholding.

A. *Appellants Put McConnell at Issue.* Appellants themselves call into question *McConnell*'s facial upholding of the prohibition by insisting that WRTL's ads—which by any reasonable test are "genuine issue ads" like the gold-standard PBA Ad—are actually in the "*heartland*," FEC Br. at 18, 28, 36 n.9 (emphasis added), or "*core*," Intervenor's Br. at 16, 21, 31 (emphasis added), of what Congress intended to ban with the electioneering communication prohibition. If that claim by BCRA sponsors and the FEC is to be taken seriously, then the prohibition is facially unconstitutional. It is unconstitutional for specifically targeting constitutionally protected "genuine issue ads" with no strict-scrutiny justification and for seeking to silence criticism of the government by the people. "[A]n ordinance suspending unconditionally the right of assembly and free speech" cannot stand. *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971).

McConnell decided that the electioneering communication prohibition was not facially unconstitutional, i.e., it was not substantially overbroad. 540 U.S. at 207 (*citing Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), and *Virginia* v. *Hicks,* 539 U.S. 113 (2003)). The substantial overbreadth doctrine is to prevent chilling of protected speech, especially where, as here, there are criminal sanctions. *See, e.g., Hicks*, 539 U.S. at 119 (and collected cases). The doctrine was developed to assure that constitutionally protected speech would not go unprotected. *See id.* ("reduces . . . social costs caused by the withholding of protected speech"); *Broadrick*, 413 U.S. at 612 ("[I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech by others may be muted . . . ."). The Court's facial upholding of the prohibition was premised on the belief that the prohibition's application to protected "genuine issue ads" would be rare. *See* 540 U.S. at 206-07.

As now revealed by Appellants' arguments, all of the assertions made by the FEC, the prime sponsors and the campaign finance reform lobby about how the prohibition is not overbroad for capturing too many "genuine issue ads" were themselves shams[74] because, under their present argument, there really are no "genuine issue ads" that mention candidates. In attacking as "sham" WRTL's ads, which are in all material ways like the Goldstein-endorsed PBA Ad, Appellants reveal that all along they intended to restrict "genuine issue ads." That, of course, is apparent from the litigation in this case and in *CCLM* (No. 06-589), in which the FEC and Intervenors have made no effort to assist the courts and the people by identifying

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[74]Although in *McConnell* Appellants argued percentages of genuine issue ads that were affected versus sham issue ads, the FEC now only mentions the word "sham" twice in its brief, neither time attempting to distinguish "genuine issue ads" from "sham" ads, FEC Br. at 17, 48 n.14, and the Intervenors' Brief never mentions the word "sham."

the characteristics of "genuine issue ads." Instead they have made every effort to prove that their own experts in *McConnell*, and this Court in *McConnell*, 540 U.S. at 206 n.88 (recognizing "genuine issue ads"), were wrong and "genuine issue ads" do not even exist.

Appellants attempt to justify the prohibition based on expert opinion that WRTL's ads might have some electoral effect. *See infra* at 19. But these experts thought that any communication during a prohibition period could influence an election, even if it didn't mention a candidate. *See infra* at 19-21. If that justification stands, then the prohibition is woefully underinclusive and, if not overturned on that basis, Congress could use this justification to expand the definition of electioneering communication to prohibit vast quantities of speech and activity. Appellants essentially make a circular argument, namely, that communications near elections affect elections so they may be regulated, and then, when confronted with the necessity of dealing with as-applied challenges for communications near elections, they fall back on the argument that, since these communications are near elections, they will affect elections and so there can be no exceptions.

In light of Appellants' new arguments, the *McConnell* Court's conclusion that application of the prohibition to genuine issue ads would not be "substantial, either in an absolute sense or relative to its application to election-related advertising," 540 U.S. at 207, is now unsupportable. "[W]here [a] statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Thus, concern for the chilling effect created by overbreadth should be greatest where—as Appellants have now admitted is the present case—the challenged statute is "aimed directly at activity protected by the Constitution." *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). When a statute "'does not aim

specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of the freedom of speech,'" facial invalidation is appropriate. *New York v. Ferber*, 458 U.S. 747, 771 & n.26 (1982) (*quoting Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

B. *The As-Applied Remedy Is Inadequate.* The overbreadth doctrine assumes that, when a statute is upheld on its face, there is an effective remedy for protected speech in the form of as-applied challenges. This Court assumes that "whatever overbreadth may exist should be *cured* through case-by -case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16 (emphasis added). Thus, the as applied remedy must be "*adequate* to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts." *New York Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 15 (1988) (emphasis added).

But if an as-applied challenge is not "adequate," then "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). The problems identified—considerable burden, risk of penalty, and risk of silence—all exist here to a degree that the as applied remedy does not cure the overbreadth.

The present case and *CCLM* (No. 06-589 in this Court) reveal this. In both *WRTL* and *CCLM*, preliminary injunctions were denied on the basis that neither group suffered any cognizable harm because there was always the PAC-option (although WRTL had insufficient PAC funds and CCLM had no PAC) or the corporation could simply avoid the "electioneering communication" definition altogether. JS App. 63(a)-

64(a), *Christian Civic League of Maine v. FEC*, 433 F. Supp.2d 81, 86 (D.D.C. 2006). The FEC fought expedition of CCLM's appeal. *CCLM* (No. 05-1447 in this Court) *FEC Opp. to Appellant's Mot. to Expedite and Consolidate Briefing*. Absent a preliminary injunction, the opportunity for expression and petition was forever lost. CCLM's case was then held moot by its district court. *Christian Civic League of Maine v. FEC*, No. 06-00614, 2006 WL 2792683 at *7 (D.D.C. Sept. 27, 2006). WRTL finally obtained recognition from its district court that its ads were constitutionally protected, but not in time to actually broadcast them. JS App. 29a. But the district court declined to state a general test to protect future ads, JS App. 22a-25a, so that this process must be gone through for each set of ads.

So any citizen group having the temerity to want to run future ads must (1) plan well in advance to allow ample litigation time (problematic because the need for grassroots lobbying frequently arises on short notice), (2) retain a lawyer, (3) endure the invasion of its privacy by a discovery investigation at the hands of the FEC and Intervenors (which often will include their political opponents), and (4) pay the legal expenses and costs to endure the scorched-earth litigation practices of the federally-funded FEC and the statutorily-permitted Intervenors in order to get prior permission from a court to run a constitutionally-protected communication at the core of our system of self-governance by the people.[75] After all that, they may still run into the dead-end of having their case mooted for lack of injunctive relief, as happened to CCLM. Groups like

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[75]Or, as the FEC suggests, FEC Br. at 24 n.6, a citizen group could just break the law and risk *criminal* penalties while still having to retain a lawyer, endure an investigation that ties up its people and resources for extended periods during the most crucial of times, reveal its otherwise private documents and inner workings, and pay vast sums to fight the FEC and well-funded Intervenors. *Contra Dombroski v. Pfister*, 380 U.S. 479, 486 (1965) ("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . .")

WRTL and CCLM have to work very hard to raise money for their ideological advocacy, and they do not have substantial funds for litigation. Because such cases would be against the FEC, citizen groups have no hope of recovering attorneys' fees and costs if they are a prevailing party. They must pay all of the costs of obtaining court permission to run a "genuine issue ad."

Thus, the proven pattern of opposition on the part of Appellants to as-applied challenges reveals that they will not be simple, quick, inexpensive little court visits whenever the need for grassroots lobbying suddenly arises and citizens need to act. Absent an adequate remedy to protect "genuine issue ads," the prohibition becomes like a burdensome prior restraint on core political speech.[76]

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[76]Prior restraint of speech, which is among "the most serious and the least tolerable infringements on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), "suppresses the precise freedom which the First Amendment sought to protect against abridgement," *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968), which "bear[s] a heavy presumption against its validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). Prior restraints are particularly lethal when they deprives core political speech of its practical value. *See Carroll* 393 U.S. at 180 ("It is vital to the operation of democratic government that the citizens have facts and idea on important issues before them. A delay or even a day or two may be of crucial importance in some instances."); *see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights."). Because the First Amendment's protection of political speech "has a structural role to play in securing and fostering our republican system of self-government," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring), a prior restraint's suppression of political speech, even if only temporary until the putative speaker prevails in litigation, is "seriously prejudicial to that system of government which the First Amendment, above all else, should be thought to undergird." John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L. J. 409, 433 (1983).

C. *Absent Clear Protection for Grassroots Lobbying, McConnell's Facial Upholding Should Be Overturned.* How may this problem be remedied? One option is to create a safe-harbor for grassroots lobbying, as proposed herein, that will eliminate the need for most future as-applied challenges. The other option is to overturn the facial upholding of the prohibition in light of the real-world experience in *WRTL* and *CCLM*, which have demonstrated that the as applied remedy for protecting genuine issue ads is inadequate. In light of the experience of these cases, WRTL believes that the better course is to overrule the prohibition, and it specifically requests a reversal. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). This case is well within this Court's standards for reversal.

This Court has provided standards for determining when it is appropriate to overrule precedent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). Stare decisis is a "principle of policy," not an "inexorable command." *Id.*; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). The Court will overturn erroneous precedent. *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Two primary rationales govern. First, "badly reasoned" or "unworkable" precedent will be overturned. *Seminole Tribe of Florida*, 517 U.S. at 63. *Accord Payne*, 501 U.S. at 827. Second, precedent is reversed if an essential factual assumption of the prior case was inaccurate or becomes inaccurate. *Vasquez*, 474 U.S. at 266. This Court applied these principles in *Lawrence v. Texas*. 539 U.S. 558 (2003). Justice Kennedy for the Court observed that stare decisis deserves respect but is not "an inexorable command." *Id.* at 577. He noted that the prior decision relied on an essential factual error. *Id.* at 571. Then he observed that it relied on

flawed legal reasoning. *Id.* at 577. Therefore, the Court held that it would not "remain binding precedent." *Id.* at 578.[77]

Consistent with the above guideline, the experience in this case and *CCLM* (No. 06-589) reveals that the assumption in *McConnell* that as-applied challenges would be an adequate remedy to protect genuine issue ads has proven inaccurate and unworkable. And while a few state legislatures have adopted electioneering communication prohibitions, they have viewed *McConnell* as a blank check to impose regulations that go well beyond those imposed by Federal law.[78] Therefore, there is clear justification for partially overturning *McConnell*.

CONCLUSION

For the reasons stated, this Court should (a) overturn the facial upholding of the prohibition in *McConnell* or (b) find the electioneering communication prohibition unconstitutional as

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[77]In the recent election-law case of *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), the Court addressed the issue of stare decisis in relation to *Buckley v. Valeo*, 424 U.S. 1 (1976). Chief Justice Roberts and Justice Stevens concluded that *Buckley* should not be overturned because there was no subsequent change in the law, *id.* at 2489, there was no change in factual assumptions, *id.*, and state legislatures had relied on *Buckley*. *Id.* at 2490. Four concurring justices left open the possibility of overturning *Buckley*. *Id.* at 2501(Alito, J.) ("unnecessary to reach the issue"), 2501 (Kennedy, J.) (regulation "may cause more problems than it solves."), 2502 (Thomas and Scalia, JJ.) ("no bar to overturing *Buckley*").

[78]A number of states have adopted "electioneering communications," some of which reach *all* communications (not just broadcast), impose increased compliance burdens, and expand the time periods. *See* Alaska Stat. § 15.13.400(5); Ariz. Civ. Stat. Ann. § 16-901.01; Cal. Gov. Code § 85310; Colo. Const. Art. XXVIII, § 2(7); Conn. Gen. Stat. § 9-333c; Fl. Stat. § 106.011(18); Hi. Code R. § 11-207.6; Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; N.C, Gen. Stat. § 163-278.80(2); Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31)(c); Vt. Stat. Ann., Titl 17 § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1A(10); *see also* Guam Code Ann. tit.3, § 19112.1.

applied to the three broadcast advertisements here, based on a clear and workable test which protects genuine issue ads generally. Alternatively, the prohibition should be declared unconstitutional as applied if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals).

Respectfully submitted,

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